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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883. 4

No. ~~1229~~ 802

FREDERICK S. AYRES, JAMES S. AYRES, AND EBENEZER R. AYRES, APPELLANTS,

vs.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, TUISCO G. WISWALL, AND ANN E. BAERMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED DECEMBER 15, 1883.

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1 UNITED STATES OF AMERICA, *ss:*

To Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October next, pursuant to a claim of appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein Frederick S. Ayres, James S. Ayre, and Ebenezer R. Ayres are appellants and you are appellees, to show cause, if any there be, why the order in the said claim of appeal mentioned and referred to should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this fifth day of December, A. D. 1883.

HENRY B. BROWN,
District Judge.

1½ Citation. (Endorsed:) 2626. Supreme Court of the United States. Frederick S. Ayres *et al. v.* Charles E. Wiswall *et al.* Citation. Filed in clerk's office, Dec. 5, 1883. Walter S. Harsha, clerk. John Atkinson, att'y for appellants.

2 Know all men by these presents, that we, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, as principals, and George Skene and George H. Gregory, of Port Austin, Michigan, and George L. Sampson, of Detroit, Michigan, as sureties, are held and firmly bound unto Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, in the sum of one thousand dollars, to be paid to the said Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, their executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seal, and dated this sixth day of November, A. D. 1883.

Whereas the above named Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, have appealed to the Supreme Court of the United States, from an order made on the 29th day of December, 1881, by the circuit court of the United States for the eastern district of Michigan, wherein the said obligees are complainants, and the said principal obligors and Charles G. Learned, Ebenezer Wiswall, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Emkie, the first Presbyterian church of Port Austin, Michigan, Mitchell Legassa, Peter Wroblishi, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas S. Kramer, Rufus Edmonds, James Ahern, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards,

are defendants in circuit court of the United States for the eastern district of Michigan, to the circuit court for Huron county, in chancery, in said State of Michigan.

Now, therefore, the condition of this obligation is such that I, the above named Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

F. S. AYRES. [L. S.]
J. S. AYRES. [L. S.]
E. R. AYRES. [L. S.]
By J. S. AYRES,
His Attorney in Fact.
GEORGE SKENE. [L. S.]
GEO. H. GREGORY. [L. S.]

3 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Michigan, }

Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres and George Skene, and George H. Gregory being duly sworn, depose and say, and each for himself saith, that he is worth the sum of one thousand dollars over and above all his just debts, except Ebenezer R. Ayres, said James S. Ayres being sworn as his attorney in fact, says that said Ebenezer R. Ayres is worth the sum of one thousand dollars over and above all his just debts, dated November 6th, 1883.

Subscribed and sworn to before me, this 6th day of November, A. D. 1883.

JAMES H. HALL,
Notary Public, Huron County, Michigan.

I approve the above bond and the sufficiency of the sureties thereto.

JAMES H. HALL,
Notary Public, Huron County, Michigan.

Approved—
H. B. BROWN.

Endorsed: 2626. Wiswall *et al. vs.* Ayres *et al.* Bond on appeal. Filed Nov. 12, 1883. Walter S. Harsha, clerk.

4 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants.

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michi-

gan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

At a session of said court, held at Bad Axe on the 15th day of January, in the year A. D. 1880.

Present: Hon. Levi L. Wixson, circuit judge.

On reading the petition of the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, filed in the above entitled cause, praying the removal of said cause to the circuit court of the United States for the eastern district of Michigan, and a bond with sufficient sureties, duly approved by the court, having been filed therein, and on motion of James H. Hall, solicitors for said defendants, it is ordered that said cause be transferred to the circuit court of the United States for the eastern district of Michigan.

LEVI L. WIXSON,
Circuit Judge.

5 STATE OF MICHIGAN.

In the Circuit Court for the County of Huron. In Chancery.

CHARLES A. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

On filing due proof of personal service of the subpœna issued in this cause on the defendant, Ebenezer R. Ayres, of the entry of the appearance of said defendant by James H. Hall, his solicitor, of the service of an order for a copy of the bill of complaint in the above entitled cause on Richard Winsor, solicitor for the complainants herein, and of the service of a copy of said bill of complaint on the said James H. Hall, solicitor for said defendant, Ebenezer R. Ayres, and more than twenty days having elapsed since the service of a copy of said bill of complaint upon the said James H. Hall, on motion of Richard Winsor, solicitor for said complainants, ordered that the bill of complaint filed in this cause be, and the same hereby is, taken as confessed by the said defendant, Ebenezer R. Ayres.

RICHARD WINSOR,
Solicitor for Complainants.

Endorsed: In the circuit court for the county of Huron. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Bill taken *pro confesso* as to Ebenezer R. Ayres. Entered and filed Dec. 18, 1879. John M. Cary, dep't register.

6 STATE OF MICHIGAN.

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

HURON COUNTY, *ss:*

Richard Winsor, being duly sworn, deposes and says that he is the solicitor for the complainants in the above-entitled cause; that a subpœna was issued in this cause on the 10th day of October, A. D. 1879, returnable on the 21st day of October, A. D. 1879, and which subpœna was personally served on the above-named defendant, Ebenezer R. Ayres, on the 10th day of October, 1879; that on the 8th day of November last the said Ebenezer R. Ayres caused his appearance to be entered in said cause by James H. Hall, his solicitor, and served upon this deponent a copy of the order entering such appearance, and of the order for a copy of the said complainants' bill of complaint.

That on the 25th day of November, A. D. 1879, this deponent served on James H. Hall, solicitor for the said defendant, Ebenezer R. Ayres, a copy of the complainants' bill of complaint in the above-entitled cause; that more than twenty days have elapsed since the service upon the said James H. Hall, solicitor for said defendant, Ebenezer R. Ayres, of the bill of complaint in this cause, and the said defendant, Ebenezer R. Ayres, has not answered thereto, nor served a copy of answer thereto on this deponent.

RICHARD WINSOR.

Subscribed and sworn to before me, this 16th day of December, 1879.

LOUIS B. WINSOR,
Notary Public.

Endorsed: In the circuit court for the county of Huron. In Chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.*

Affidavit for *pro confesso* as to Ebenezer R. Ayres. Filed Dec. 18, 1879. John M. Cary, dep't register.

7 STATE OF MICHIGAN :

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Mabie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

To the said court :

Your petitioners, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, respectfully represents :

That they are defendants in said cause ; that said cause was commenced about Apr. 15th, 1879; that the same has not yet been tried, and has not been in condition to be tried.

That said complainants are, and were at the time said suit was commenced, citizens of New York.

That your petitioners, Frederick S. Ayres and James S. Ayres, are, and were when said suit was commenced, citizens of Michigan, and your petitioner, Ebenezer R. Ayres, is, and was when said suit was commenced, a citizen of Ohio.

That in said suit, which is for the foreclosure of a mortgage on a large tract of land in the eastern district of Michigan, there is a controversy which is wholly between said complainants and these petitioners, and which can be fully determined as to them without the presence of the other defendants.

That the matter in dispute in said controversy exceeds in value five hundred dollars, exclusive of costs.

Wherefore your petitioners pray that said cause may be removed to the circuit court of the United States for the eastern dis-
8 trict of Michigan, in which said Huron county lies, and that all further proceedings herein may be stayed.

F. S. AYRES,
By J. S. AYRES,
His Agent & Att'y in Fact.
E. R. AYRES,
By J. S. AYRES,
His Agent and Att'y in Fact.
J. S. AYRES.

JAMES H. HALL, *Sol'or for Petitioner.*
ATKINSON & ATKINSON, *of Counsel.*

STATE OF MICHIGAN, } ss.
County of Huron. }

On the 28th day of November, 1879, before me personally appeared James S. Ayres, one of the above petitioners, who signed the foregoing petition and bond following, and made oath that he was the agent of the said petitioners, Fred'k S. Ayres, Ebenezer R. Ayres, and authorized by them to sign this petition and bond; that he has made the foregoing petition and knows the contents thereof, and that the same is true.

J. S. AYRES.

Subscribed and sworn before me, this 28th day of Nov. 1879.
CARL HEISTERMAN,
Notary Public, Huron Co., Mich.

Know all men by these presents, that we, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, as principals, and John Atkinson as security, are held and firmly bound unto Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, in the sum of two hundred and fifty dollars, to be paid to the said Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, their executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, and each of them, firmly by these presents.

Sealed with our seals, dated the 25th day of November, 1879.

Whereas the said Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, as complainants, have commenced against the said petitioners and others, as defendants, a certain suit in the circuit court for the county of Huron, and whereas the said petitioners and defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, have filed their petition in the said circuit court for the removal of said suit into the next circuit court of the United States for the eastern district of Michigan.

Now, therefore, the condition of this obligation is such, that if the above named Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres shall enter or cause to be entered in the said circuit court of the United States, on the first day of its next term or session, a copy of the record, and copies of all process, pleadings, and other proceedings in the said suit, and shall pay all costs that may
9 be awarded by the said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall do and cause to be done such other appropriate acts as are required to be done upon the removal of a suit into the circuit court of the United States, then the above

obligation shall be void, otherwise it shall remain in full force and virtue.

F. S. AYRES. [L. S.]
E. R. AYRES. [L. S.]
By J. S. AYRES,
Their Agent and Att'y-in-Fact.
J. S. AYRES. [L. S.]
JOHN ATKINSON. [L. S.]

STATE OF MICHIGAN, } *ss:*
Wayne County, }

John Atkinson, the surety named in the foregoing bond, being duly sworn, deposes and says:

That he is a resident of the State of Michigan, and is worth the sum of five hundred dollars over all just debts and liabilities in real estate, subject to execution in said county of Wayne.

JOHN ATKINSON.

Subscribed and sworn to before me, this 25th day of Nov., 1879.

THEO. V. TROMBLY,
Notary Public, Wayne County, Michigan.

Endorsed: Huron circuit court. In chancery. Chas. E. Wiswall *et al. vs.* F. S. Ayres *et al.* Petition for removal, &c. Filed Nov. 28th, 1879, at 9 o'clock a. m. John M. Cary, deputy register.

10 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

HURON COUNTY, *ss:*

Louie B. Winsor, being duly sworn, says that on the 25th day of November, A. D. 1879, he served a copy of the bill of complaint in the above entitled cause on James H. Hall, solicitor for the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, by delivering the same to him personally.

LOUIE B. WINSOR.

Sworn to and subscribed before me, this 25th day of November, A. D. 1879.

WM. T. CHAPPELL,
Notary Public.

11 HURON COUNTY, *ss:*

Horace G. Snover, being duly sworn, deposes and says that on the 15th day of May, 1879, he served a copy of the bill of complaint in the above-entitled cause on James H. Hall, solicitor then for the defendants, Frederick S. Ayres and James S. Ayres, and that the said James H. Hall has, since the service of said copy upon him, entered his appearance in said cause as solicitor for the defendant Ebenezer S. Ayres, and served notice thereof on the solicitor for the complainant by leaving the same in his office

HORACE G. SNOVER.

Sworn to and subscribed to before me, this 25th day of November, A. D. 1879.

WM. T. CHAPPELL,
Notary Public.

STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainant,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

SIRS: Please to take notice that in pursuance of the stipulation made in this cause on the 25th day of September, the complainants elect and hereby give notice thereof to take further testimony in this cause within the thirty days from the expiration of the sixty days first provided for in said stipulation, to wit, thirty days from the 24th day of November, 1879.

Nov. 25th, 1879. RICHARD WINSOR,
Solicitor for Complainants.

12 To James H. Hall, Esq., solicitor for def'ts, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, and to Horace G. Snover, Esq., solicitor for def'ts Ebenezer Wiswall and Charles G. Leonard.

STATE of MICHIGAN, } ss:
County of Huron, }

Louie B. Winsor, being duly sworn, deposes and says that on the 25th day of November, 1879, he served notice, of which the within is a true copy, on James H. Hall, solicitor for the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, and on Horace G. Snover, solicitor for the defendants, Ebenezer Wiswall and Charles G. Learned, by delivering the same to them personally.

LOUIE B. WINSOR.

Sworn to and subscribed before me, this 25th day of November, A. D. 1879.

WM. T. CHAPPELL, *Notary Public.*

Endorsed: Huron county circuit court. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Notice of election to take further proof as per stipulation of Sept. 25th, '79.

13 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

SIR: Please to take notice that the following witnesses, to wit, Charles G. Learned, James R. Learned, Frederick S. Ayres, James S. Ayres, and Richard Smith, all of Port Austin, Michgan, will be examined as witnesses, and their testimony taken on behalf of the complainants in the above-entiled cause, before George C. Green, circuit court commissioner for the county of Huron, in the State of Michigan, such examination to commence on the 28th day of November, A. D. 1879, one o'clock in the afternoon, at the Winsor House, Port Austin, Michigan, and proceed as shall suit the convenience of said commissioner. Also, please take notice that in pursuance of the stipulation made in this cause, on September 25th, 1879, the complainant's elect and hereby give notice thereof to take further testimony within thirty days from the sixty days first provided for in said stipulation.

Nov. 27th, 1879.

RICHARD WINSOR,
Complainant's Solicitor.

To James H. Hall, Esq., solicitor for defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, & T. Horace G. Snover, Esq., solicitor for defendants, Charles G. Learned & Ebenezer Wiswall.

14 STATE OF MICHIGAN, } ss:
County of Huron. }

Louie B. Winsor, being duly sworn, deposes and says that on the 20th day of November, 1879, he served notice, of which the within is a true copy, on James H. Hall, solicitor for defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, and on Horace G. Snover, solicitor for defendants, Ebenezer Wiswall and Charles G. Learned, by delivering the same to them personally.

LOUIE B. WINSOR.

Sworn to and subscribed before me, this 25th day of November, A. D 1879.

WM. T. CHAPPELL.

Endorsed: Huron county circuit court, in chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Notice to take proofs, Nov. 28th, 1879. Filed Nov. 26, 1879. John M. Carey, dep'ty register.

15 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

On motion of James H. Hall, solicitor for said defendant, Ebenezer R. Ayres, ordered that the appearance of said defendant, Ebenezer R. Ayres, be, and the same is hereby, entered; and, on like motion, it is further ordered that the complainants serve upon the said solicitor a copy of their bill of complaint filed in this cause within fifteen days after service upon them or their solicitor of notice

of this order, or, in default thereof, that said bill be dismissed with costs.

Dated November 8th, A. D. 1879.

JAMES H. HALL,
Solicitor for Defendant, Ebenezer R. Ayres.

ATKINSON & ATKINSON, *of Counsel.*

Endorsed: The circuit court for the county of Huron, Mich. In chancery. Charles E. Wiswall, complainant, *vs.* Frederick S. Ayres *et al.*, defendants. Order for copy of bill, and notice entered and filed Nov. 8, 1879. John M. Cary, dept. register.

16 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

SIR: Take notice that the following witnesses, to wit, Charles G. Learned, Frederick S. Ayres, James S. Ayres, George H. Van Wort, and Richard Smith, of Port Austin, Michigan, will be examined as witnesses, and their testimony taken on behalf of the above named complainants, before George C. Green, Esq., the circuit court commissioner of this court, at Winsor and Snover's office, Port Austin, Huron county, Michigan, such examination to commence on the fourteenth day of August, 1879, at nine o'clock in the forenoon, and proceed as shall suit the convenience of said commissioner. Dated August 7th, 1879.

Yours, &c.,
RICHARD WINSOR,
Solicitor for Complainants.

To James H. Hall, solicitor for defendants, Frederick S. Ayres and James S. Ayres. Atkinson and Atkinson, of counsel.

17 Received a notice of which this is a copy, this 7th day August, 1879.

JAMES H. HALL,
Sol'r for Def't.

AUGUST 19TH, 1879.

The time for taking testimony under this notice is by agreement extended to August 25th, 1879, at the same hour and place.

R. WINSOR,
Sol'r for Co'pl'ts.
JAMES H. HALL,
Sol'r for Def'ts, J. S. and Fred'k S. Ayres.
HORACE G. SNOVER,
Sol'r for Deft's, Chas. G. Learned & Ebenezer Wiswall.

Endorsed: The circuit court for the county of Huron, in chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Notice of the examination of witnesses, Charles G. Learned, Frederick S. Ayres, James S. Ayres, George N. Van Wort, and Richard Smith. Filed Oct. 13th, 1879. Charles E. Thompson, register.

18 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, TUISCO G. WISWALL, and ANN E. BAERMAN, Complainants.

vs.

FREDDRICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

At the request of the solicitor for the defendants, Frederick S. Ayres and James S. Ayres, and on account of the absence of their counc*il*, Col. John Atkinson, the time for taking testimony under the motion, of which the annexed is a copy, is, by agreement of parties, hereby extended until the 3d day of September next, at the same hour and place, and before the same person; and it is further agreed, in view of the short time left in which to take proofs, under the order heretofore entered in this cause and the stipulation heretofore made in this cause, extending the time to October 4th, next, that the solicitor for the defendants, Frederick S. Ayres and James S. Ayres, shall on closing their proofs, on or before the 4th of October next, give notice to the solicitor for the complainants that their proofs are in, and thereupon the solicitor for the complainants, if he requires further time in which to close his proofs on the part of the complainant, and elects to take further proofs, shall have thirty days from said 4th day of October next in which to close the proofs on the part of the complainant, upon giving notice to the solicitor

for the defendants, Frederick S. and James S. Ayres, that
19 he requires and elects to take further proofs, which motion shall be given within two days after he receives notice from the solicitor for the defendants, Frederick S. Ayres and James S. Ayres, that their proofs are closed; and in case such motion is given by the solicitor for the complainants, no order shall be entered in this cause closing the proofs until the expiration of said thirty days after the 4th of October, 1879.

Aug. 23d, 1879.

RICHARD WINSOR,
Solicitor for Complainants.
JAMES H HALL,
Sol'r for Def'ts, Frederick S. and James S. Ayres.
HORACE G. SNOVER,
Solicitor for Ebenezer Wiswall and Charles G. Learned.

20 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

It is hereby stipulated in this cause, by and between Richard Winsor, solicitor for the complainants, and James H. Hall, solicitor for the defendants, Frederick S. Ayres and James S. Ayres, and Horace G. Snover, solicitor for the defendants, Charles G. Learned and Ebenezer Wiswall, that, in addition to the testimony already taken in this cause, further testimony may be taken therein, before any circuit court commissioner in any county in this State within sixty days from the date of this stipulation; it is further stipulated, that any of the parties to this suit may, under any order or stipulation heretofore made or entered therein, or that may heretofore be made or entered in this cause within the time herein provided, take the testimony of their witnesses upon giving five days notice to the opposite party of the names and places of abode of the witnesses to be examined, and of the time and place of such examination, and the person before whom the same will be examined, instead of ten days' notice as required by rule forty seven of this court.

That the complainants, after the expiration of said sixty days, may, upon like motion if they so elect by notice served on the opposite solicitor, take further testimony within thirty days

21 from *from* the expiration of said sixty days, and at the expiration of the time herein fixed for taking proofs, either party may enter an order, of course, that the proofs be closed.

It is further stipulated, that all testimony heretofore taken, or that may be hereafter taken under the orders or stipulations now made or entered, or that may hereafter be made or entered therein, may be read on the hearing of this cause, as if the same had been taken in the usual manner, under the rules and practice of this court.

Sept. 25th, 1879. RICHARD WINSOR,
Solicitor for Complainants.
JAMES H. HALL,
Solicitor for Defendants, Frederick S. Ayres and James S. Ayres.
HORACE G. SNOVER,
Solicitor for Def'ts, Ebenezer Wiswall and Charles G. Learned.

22 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,
vs.
FREDERICK S. AYERS, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empike, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

This cause being at issue as to the defendants Frederick S. Ayres, James S. Ayres, Ebenezer Wiswall, and Charles G. Learned, by the complainants filing a replication to the answer of the defendants, Frederick S. Ayres and James S. Ayers, and by their filing replications to the respective answers of the defendants Ebenezer Wiswall and Charles G. Learned, and the bill of complaint having been taken as confessed by the rest of the defendants in this cause, and, more than ten days having elepsed since this cause was at issue.

On motion of Richard Winsor, solicitor for the complainants, ordered that the testimony in this caused be taken within sixty days from service of notice of this order.

RICHARD WINSOR, *Solicitor of Compl'ts.*

To James H. Hall, Esq., solicitor for defendants, Frederick S. Ayres and James S. Ayres:

23 SIR: Please take notice that the foregoing is a copy of an order this day entered in the foregoing entitled cause.

Sept. 25th, 1879. RICHARD WINSOR,
Solicitor for Compl'ts.

HURON COUNTY, *ss:*

Louie B. Winsor being duly sworn deposes and says, that he served an order an- notice, of which the foregoing is a true copy, on James H. Hall, solicitor for defendants, Frederick S. Ayres and James S. Ayres, on the twenty-sixth day of September, A. D. 1879, by delivering the same to him personally at his office in the village of Port Austin, Mich.

LOUIE B. WINSOR.

Sworn to and subscribed before me, this eighth day of October, A. D. 1879.

WM. T. CHAPPELL,
Notary Public.

Endorsed: State of Michigan. The circuit court of the county of Huron, Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* notice of order served on J. H. Hall Sept. 26, 1879. Filed Oct. 13, 1879, Charles E. Thompson register.

24 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

It is hereby stipulated and agreed, by and between Richard Winsor, solicitor for the above-named complainants, and James H. Hall, solicitor for the defendants, Frederick S. Ayres and James S. Ayres, and Horace G. Snover, solicitor for the defendants, Ebenezer Wiswall and Charles G. Learned, that the time fixed by the order heretofore entered in this cause in which to take testimony in this cause, notice of which was served on the solicitor for the complainants July 19th, 1879, be, and the same is hereby, extended until October 4th, 1879, within which time any of the parties to the cause who have appeared may take testimony therein, upon giving to the solicitor of the opposite party ten (10) days' notice of the names and places of abode of the witnesses to be examined, and of the time and place of examination, and of the person before whom the same shall be taken, as required by the rules and practice of this court, at the ex-

piration of which time either party may enter an order of course that the proof be closed.

August 19th, 1879.

RICHARD WINSOR,
Solicitor for Compl'ts.

JAMES H. HALL,
Solicitor for Defendants, Frederick S. & James S. Ayres.

HORACE G. SNOVER,
Solicitor for Defendants, Ebenezer Wiswall & Charles Learned.

Endorsed: The circuit court for the county of Huron. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Stipulation to take testimony. Filed Oct. 13, 1879. Charles E. Thompson, register.

25 STATE OF MICHIGAN:

The Circuit Court for the County of Huron, to wit, in Chancery.

In the name of the people of the State of Michigan to Frederick S. Ayres, Ebenezer Wiswall, Charles G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Fort Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babinderde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Greeting:

You are hereby commanded to appear before the circuit court for the county of Huron, in chancery, at the court-house, in the village of Bad Axe, on the 21st day of October, A. D. 1879, then and there to answer unto a bill of complaint exhibited against you as defendants by Charles E. Wiswall, William Mc. A. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, as complainants, and this you shall in no wise omit, under the penalty of one thousand dollars.

Witness the Hon. Levi L. Wixson, circuit judge for the county of Huron, at the court-house, in Bad Axe, the tenth day of October, in the year of our Lord one thousand eight hundred and seventy nine.

CHARLES E. THOMPSON, *Register.*
By JOHN M. CARY, *Deputy Register.*

RICHARD WINSOR,
Solicitor for Complainants.

STATE OF MICHIGAN, } *ss:*
County of Huron. }

Huron County, ss:

Richard Winsor, being duly sworn, says that on the 10th day of October, A. D. 1879, he served the within subpœna, personally, on

Ebenezer R. Ayres, one of the within named defendants, by delivering to said defendant, at Port Austin in said county, a true copy of the within subpœna, inscribed copy, and subscribed complainant's solicitor, and at the same time he showed said defendant the original subpœna, with the seal of the court impressed thereon.

RICHARD WINSOR.

Sworn to and subscribed before me, this 10th day of October, 1879.

THOMAS WINSOR,
Notary Public.

Endorsed: Circuit court, county of Huron. In chancery. Charles E. Wiswall *et al.*, complainants, *vs.* Frederick S. Ayres *et al.*, defendant. Subpœna. Filed Oct 13, A. D. 1879. John M. Cary, dep't. register.

26 STATE OF MICHIGAN.

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants—

This cause being at issue as to the defendants Frederick S. Ayres, James S. Ayres, Ebenezer Wiswall, and Charles G. Learned, by the complainants filing their replication to the answer of the defendants Frederick S. Ayres and James S. Ayres, and by their filing replication to the respective answers of the defendants Ebenezer Wiswall and Charles G. Learned, and the bill of complaint having been taken as confessed by the rest of the defendants in this cause, and more than ten days having elapsed since this cause was at issue—

On motion of Richard Winsor, solicitor for the complainants, ordered that the testimony in this cause be taken within sixty days from service of notice of this order.

RICHARD WINSOR,
Solicitor for Complainants.

Endorsed: Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Order to take proof entered and filed Sept. 25th, 1879. John M. Cary, dep't. register.

27 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa. Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahern, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

On filing due proof of personal service of the subpœna issued in this cause on all the defendants therein, except the defendants Ebenezer Wiswall and Ebenezer R. Ayres, on or before the return day thereof, and more than twenty days having elapsed since said return day, and the defendants, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybe, Frederick Empkee, Julius Empkee, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobiski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahern, Samuel Parks, Peter Patterson, John Babindererde, Charles Empkee, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards—

Not having appeared in said cause, and due proof thereof having been filed by affidavit of Richard Winsor, solicitor for the complainants, on motion of Richard Winsor, solicitor for the complainants—

It is ordered that the bill of complaint filed in this court be, and the same hereby is, taken as confessed by the said defendants,

28 Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards.

And that it be referred to George C. Green, circuit court commissioner for the county of Huron, to take proofs of the facts and circumstances stated in said bill of complaint, and that said commissioner, with all convenient speed, report to this court said proofs,

together with all other matters hereby referred to him, and his opinion thereon.

Entered August 12th, A. D. 1879.

RICHARD WINSOR,
Solicitor for Complainants.

Endorsed: In the circuit court for the county of Huron. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Order *pro confesso.* Entered and filed August 12th, 1879. John M. Cary, dep't. register.

29 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complaints,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

HURON COUNTY, *ss:*

RICHARD WINSOR, being duly sworn, deposes and says that he is solicitor for the complainants in the above-entitled cause; that the subpœna issued in this cause was personally served on all the defendants in said cause, except the defendant Ebenezer Wiswall, who has appeared therein, and Ebenezer R. Ayres; that due proof of such service by the return of said subpœna was duly filed in said cause Apr. 26th, A. D. 1879, being before the return day thereof; that more than twenty days have elapsed since said return day, and the defend-
30 ants, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, the First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards have not appeared in said cause, or caused notice of their appearance to be served on the solicitor for the complainants.

RICHARD WINSOR.

Sworn to and subscribed before me, this 9th day of August, A. D. 1879.

HORACE G. SNOVER,
Notary Public.

Endorsed: The circuit court for the county of Huron. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Affidavit filed August 12th, 1879. John M. Cary, dep't. register.

31 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, complainants

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, the First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, defendants.

The replication of Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, complainants, to the answer of Charles G. Learned, one of the above-named defendants.

These repliants, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be taken to the manifold insufficiencies of the said answer, for replication thereunto say, that they will aver, maintain, and prove their bill of complaint to be true, certain, and sufficient in the law to be answered unto. And that the said answer is uncertain, untrue, and insufficient to be replied unto by these replaints, without this, that any other matter or thing whatever in the said answer contained, material or effectual in the law to be relied unto, and not herein and hereby sufficiently replied unto, confessed, and avoided, traversed, or denied, is true; all which matters and things these replaints are and will be ready to aver, maintain, and prove as this honorable court shall direct and pray, as in and by their said bill they have already prayed.

RICHARD WINSOR,
Solicitor for Compl'ts.

PORT AUSTIN, *Aug. 9th*, 1879.

I have this day received a copy of this replication.

HORACE G. SNOVER,
Solicitor for Def't, Learned.

Endorsed: The circuit court for the county of Huron. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Filed August 9th, 1879. John M. Cary, dep't. register. Replication the answer of Charles G. Learned.

32 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

The replication of Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, complainants, to the answer of Ebenezer Wiswall, one of the above named defendants.

These replaints, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and *prove* their bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer is uncertain, untrue, and insufficient to be replied unto by these replaints, without this, that any other matter or thing *whatever* in the *said* answer contained material or effectual in the law to be replied unto, and not herein hereby sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these replaints are and will be ready to aver, maintain, and prove, as this honorable court shall direct, and pray as in and by their said bill they have already prayed.

RICHARD WINSOR,
Solicitor for Compl't's.

PORT AUSTIN, *August 7th*, 1879.

I have this day received a copy of this replication.

HORACE G. SNOVER,
Solicitor for Deft. Wiswall.

Endorsed: The circuit court for the county of Huron. In chan-

cery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Replication to answer of Ebenezer Wiswall. Filed August 9th, 1879. John M. Cary, dep't. register.

33 STATE OF MICHIGAN:

In the Circuit Court of the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

On filing due proof of personal service of the order of appearance, made in this cause on the 18th day of April, A. D. 1879, on the defendant Ebenezer R. Ayres, more than twenty days before the time fixed therein for his appearance, and more than twenty days having elapsed since the expiration of the time fixed by said order for the appearanc of said defendant, and said defendant Ebenezer R. Ayres not having appeared in said cause, and due proof thereof by affidavit of Richard Winsor, solicitor for the complainants, having been filed in said cause: On motion of Kichard Winsor, solicitor for the complainants, it is ordered that the bill of complaint filed in this cause be, and the same is hereby, taken as confessed by the said defendant, Ebenezer R. Ayres, and that it [be] referred to George C. Green, circuit court commissioner for the county of Huron to take proofs of the facts and circumstances stated in said bill of complaint, and that said commissioner, with all convenient speed, report to this court said proofs, together with all other matters hereby referred to him, and his opinion thereon.

RICHARD WINSOR,
Solicitor for Complainants.

Endorsed: In the circuit court for the county of Huron. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Order *pro. con.*, as to Ebenezer R. Ayres, entered and filed August 9th, 1879. John M. Cary, dep't. register.

34 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

HURON COUNTY, *ss:*

Richard Winsor, being duly sworn, says that he [is] solicitor for the complainants in the above-entitled cause; that an order was made in said cause, on the 18th day of Apr., A. D. 1879, requiring the defendant, Ebenezer R. Ayres, to enter his appearance in said cause in three months from the date thereof, or in default thereof that the bill of complaint be taken as confessed by said defendant, and it was further ordered that the defendant cause a copy of said order to be served on the said defendant, Ebenezer R. Ayres, at least twenty days before the time prescribed for his appearance; that a copy of said order was personally served on said defendant on the 5th day of June, A. D. 1879, be delivering the same to him personally at the city of Sandusky, in the State of Ohio; that more than twenty days have elapsed since the expiration of the three months in which said defendant was required by said order to cause his appearance to be entered in this cause, and the said defendant has not appeared in said cause, or caused notice of his appearance to be served on the solicitor for the complainants herein; that due proof of the service of said order on the said defendant has been duly filed in this cause.

RICHARD WINSOR.

Subscribed and sworn to before me, this 9th day of August, A. D. 1879.

THOMAS WINSOR,
Notary Public.

Endorsed: In the circuit court for the county of Huron. In chancery. Wm. McA. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Affidavit of non-appearance of Ebenezer R. Ayres. Filed August 9th, 1879. John M. Cary, dep'ty register.

35 *Answer of Charles G. Learned.*

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM MCALPINE WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,
vs.
FREDERICK S. AYRES *et al.*, Defendants.

The answer of the defendant, Charles G. Learned, to the bill of complaint of the said complainants.

This defendant, saving to himself all manner of advantage of objection or exception to the many errors in the said bill of complaint contained, for answer thereunto, or unto so much thereof as this defendant is advised is material for him to make answar unto, answers and says:

That he admits that on the 27th day of January, 1869, Frederick S. Ayres, Ebenezer Wiswall, and this defendant were indebted to Catherine Wiswall in the sum stated in the said bill of complaint, and the giving the bond and mortgage therefor, and the execution and recording of said mortgage, as alleged therein.

This defendant further admits that on the 20th day of October, A. D. 1874, this defendant and one Jonas R. Learned, who was interested with this defendant in certain personal property, contracted to sell, and did sell, to Ebenezer R. Ayres, one of the above-named defendants, all their interest in the real and personal estate, etc., of Ayres, Learned & Co., said real property being a one-quarter interest in the lands described in said mortgage, together with numerous other lands, as alleged in said bill of complaint, but insists that said sale was made, subject to the payment of said mortgage
36 by said Ebenezer R. Ayres; that said mortgage, by the terms of said sale, was to be paid by the said Ebenezer R. Ayres and the defendants, Frederick S. and James S. Ayres, and as between the said Ebenezer R. Ayres and this defendant and Jonas R. Learned, was taken and allowed as part of the purchase price of said premises so contracted and sold by this defendant and Jonas R. Learned to the said Ebenezer R. Ayres.

This defendant admits that afterwards, on the 20th day of October, 1874, in pursuance of the terms of said contract, this defendant and Maria Learned, his wife, did, by deed, under their hands and seals, convey to the said Ebenezer R. Ayres all their interest in the lands described in said mortgage, except in certain descriptions, as in said bill of complaint particularly set forth, which said conveyance was made expressly subject to the payment of said mortgage, as set forth in said bill of complaint.

And this defendant admits that afterwards, on the 5th day of August, 1875, the said Frederick S. Ayres and James S. Ayres conveyed, by warranty deed, in pursuance of the said contract between the defendant and Jonas R. Learned and Ebenezer R. Ayres, their wives joining therein, together with numerous other lands, that portion of the lands covered by said mortgage and not conveyed by the

deed from Charles G. Learned and wife to Ebenezer R. Ayres, as heretofore stated, to this defendant.

And this defendant submits, that under the state of facts made out by the bill of complaint in this cause, the answer of the defendants, Frederick S. Ayres and James S. Ayres, and the contract and conveyance of October 20, 1874, as herein stated, that that portion of the lands described in said mortgage in which the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, or any or either of them, now have any interest, or in which they, or any or either of them, had any interest since October 20, 1874. the time of the making of the said contract between Charles G. Learned, Jonas R. Learned, and Ebenezer R. Ayres, should be first sold before any of said lands in which this defendant has now or has had since October 20th, 1874, any interest, and asks this court to so decree.

And this defendant further submits, that by the terms of said contract between this defendant and Jonas R. Learned and Ebenezer R. Ayres, aforesaid, and of the conveyance from Charles G. Learned and wife to Ebenezer R. Ayres, as aforesaid, the said Ebenezer R. Ayres is substituted for this defendant, so far as the payment of said mortgage is concerned, and asks this honorable court to decree
37 that, as between this defendant and the said defendant, Ebenezer R. Ayres, the said Ebenezer R. Ayres is first personally liable for the payment of any balance that may remain due to the said complainants of the principal and interest due on said bond and mortgage, if the sale of said mortgaged premises, as prayed for in said bill of complaint, fail to produce sufficient to pay the whole of said mortgaged debt and the costs of this suit, and that the said defendant, Ebenezer R. Ayres, be decreed to pay to this defendant his costs of this suit most wrongfully sustained.

CHARLES G. LEARNED,
By HORACE G. SNOVER,
Hts Solicitor.

Answer of Ebenezer Wiswall.

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM MCALPINE WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES *et al.*, Defendants.

The answer of the defendant, Ebenezer Wiswall, to the bill of complaint heretofore filed in this cause.

This defendant, saving to himself all objections and exceptions to the many insufficiencies in the said bill of complaint contained, for answer thereunto, or unto so much thereof as this defendant is advised is material for him to make answer unto, answering, says:

That he admits that on the 27th day of January, 1869, Frederick S. Ayres, Charles G. Learned, and this defendant were in-

38 debted to Catharine A. Wiswall in the sum stated in said bill of complaint, and the giving of the bond and mortgage therefor, and the execution and recording of said mortgage, as therein alleged.

And this defendant further admits that on the 31st day of October, 1871, he contracted to sell all his right, title, and interest in and to the lands covered by said mortgage, together with other property, to the defendant Frederick S. Ayres, as alleged in said bill of complaint, but insists that said sale was made subject to the payment of said mortgage so made as aforesaid by Frederick S. Ayres, Charles G. Learned, and this defendant to Catharine A. Wiswall, which said mortgage, by the terms of said sale, was to be paid by said Frederick S. Ayres and Charles G. Learned, and as between this defendant and the said Frederick S. Ayres, was allowed and taken as part of the purchase price of said premises so contracted to be sold by this defendant to said Frederick S. Ayres.

And this defendant submits that on the state of facts set forth in the bill of complaint, the answer of Frederick S. Ayres and James S. Ayres, that that portion of the lands described in said mortgage, in which the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, or any or either of them, have any interest now, or in which they, or either of them, have had any interest since the 31st day of October, 1871, the date of the contract between this defendant and the said Frederick S. Ayres, either by deed, contract, or otherwise, should be first sold to satisfy the amount due upon said mortgage, and prays this honorable court to so decree.

And this defendant further submits, that by the terms of said contract of sale between this defendant and the defendant Frederick S. Ayres, that the said Frederick S. Ayres is substituted for this defendant so far as the payment of the said mortgage is concerned, and asks this honorable court to decree that, as between this defendant and the said defendant Frederick S. Ayres, that said Frederick S. Ayres is first personally liable for the payment of any balance that may remain due to the said complainants of the principal and interest due on said bond and mortgage, if the sale of said mortgaged premises, as prayed for in said bill of complaint, fail to produce sufficient to pay the whole of said mortgaged debt and the costs of this suit, and that the said defendant Frederick S. Ayres be decreed to pay to this defendant his costs of this suit, most wrongfully sustained.

EBENEZER WISWALL,
By HORACE G. SNOVER, *His Solicitor.*

39 STATE OF MICHIGAN.

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complanants,

vs.

FREDERICK S. AYERS, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayers, Ebenezer R. Ayers, Peter Smeader, Jr., John

Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, the First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

This cause being at issue as to the defendants, Frederick S. Ayers and James S. Ayers, by the filing of complaimants replication to the answer of said defendants, and neither party having obtained the right of an examination of witnesses in open court, and more than ten days having elapsed since the above entited cause was at issue as aforesaid, to wit, by the filing and service of complainants' replication on June 25th, 1879.

On motion of James H. Hall, solicitor for the defendants, Frederick S. Ayers and James S. Ayers, ordered that the testimony of the witnesses of said defendants, be taken before George C. Green, Esq., the circuit court commissioner for this county, within sixty days after service upon complainants, or their solictor, of notice of this order.

Dated July 17th, 1879. JAMES H. HALL,
Solicitor for Defendants, Frederick S. and James S. Ayers.

ATKINSON AND ATKINSON,
Of Counsel.

Endorsed: In the circuit court for the county of Huron. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayers *et al.*, defendants. Order that witness be examined before circuit court commissioner within sixty days. Entered. Filed July 17th, 1879. John M. Cary, dep'ty register.

40 STATE OF MICHIGAN.

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall and Ann E. Baerman, complainants,
vs.
FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

STATE OF MICHIGAN, } ss :
County of Huron, }

Richard Winsor, being duly sworn, deposes and says that he is the solicitor for the complainants in the above-entitled cause; that the bill of complaint was filed in this cause on April 15th, A. D. 1879, and that a subpœna was issued therein on April 16, 1879, and cannot be served upon the said defendants, Ebenezer Wiswall and Ebenezer R. Ayres, by reason of their not being residents of this State. This deponent further says that the said Ebenezer Wiswall is a resident of West Troy, in the State of New York, and that the said Ebenezer R. Ayres is a resident of the city of Sandusky, in the State of Ohio, and further deponent saith not.

RICHARD WINSOR.

Subscribed and sworn to before me, this 18th day of April, A. D. 1879.

WM. T. CHAPPELL,
Notary Public.

41 STATE OF MICHIGAN :

In the Circuit Court for the County of Huron, Twenty-fourth Judicial Circuit. In Chancery.

Suit pending this 18th day of April, A. D. 1879, wherein Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman are complainants, and Frederick S. Ayres, Ebenezer Wiswall, Charles G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards are defendants.

It satisfactoraly appearing to the undersigned judge of said circuit court, by the affidavit of the complainants' attorney, that the said defendants, Ebenezer Wiswall and Ebenezer R. Ayres, are not residents of this State, and that the said Ebenezer Wiswall is a resident of West Troy, in the State of New York, and that the said Ebenezer R. Ayres is a resident of the city of Sandusky, in the State of Ohio, and that process for their appearance cannot be served upon them by reason of such non-residence within the State. On motion of Richard Winsor, solicitor for said complainant, it is hereby ordered that the said defendants, Ebenezer Wiswall and Ebenezer R. Ayres, cause their appearance to be entered in this cause in three months from the date of this order, or in default thereof the bill of complaint in this cause be taken as confessed by said defendants, Wiswall & Ayres.

And it is further ordered that within twenty days from the date

of this order, the complainants cause a copy of this order to be published in the Huron County News, a newspaper printed in said county of Huron, and that said publication be continued at least once in each week for six weeks in succession, or that they cause a copy of this order to be personally served on the said defendants, Ebenezer Wiswall and Ebenezer R. Ayres, at least twenty days before the time prescribed for their appearance.

Dated April 18th, 1879. E. W. HARRIS,
Circuit Judge

Endorsed: State of Michigan. The circuit court for the county of Huron, in chancery. William McAlpine Wiswall *et al. vs.* Frederick S. Ayres *et al.* Affidavit and order filed June 26, 1879. John M. Cary, dep'ty register.

42 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron, Twenty-fourth Judicial Circuit. In chancery.

Suit pending this 18th day of April, A. D. 1879, wherein Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman are complainants, and Frederick S. Ayres, Ebenezer Wiswall, Charles G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, the First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliska, Otis B. Williams, James Kerr, Mark Carrington, Augnst Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahern, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards are defendants.

It satisfactorily appearing to the undersigned judge of said circuit court, by the affidavit of the complainants' attorney, that the said defendants, Ebezener Wiswall and Ebenezer R. Ayres, are not residents of this State, and that the said Ebenezer Wiswall is a resident of West Troy, in the State of New York, and that the said Ebenezer R. Ayres is a resident of the city of Sandusky, in the State of Ohio, and that process for their appearance cannot be served upon them by reason of such non-residence within the State, on motion of Richard Winsor, solicitor of said complainants, it is hereby ordered that the said defendants, Ebenezer Wiswall and Ebenezer R. Ayres, cause their appearance to be entered in this cause in three months from the date of this order, or in default thereof, the bill of complaint in this cause be taken as confessed by said defendants, Wiswall and Ayres.

And it is further ordered that within twenty days from the date of this order the complainants cause a copy of this order to be published in the Huron County News, a newspaper printed in said county of Huron, and that said publication be continued at least once in each week for six weeks in succession, or that they cause a

copy of this order to be personally served on the said defendants, Ebenezer Wiswall and Ebenezer R. Ayres, at least twenty
43 days before the time prescribed for their appearance.

E. W. HARRIS,
Circuit Judge.

Dated April 18, 1879.

STATE OF OHIO, }
County of Erie, } *ss:*

John Macky, being duly sworn, deposes and says that on the 5th day of June, A. D. 1879, he served upon Ebenezer R. Ayres an order, of which the within is a true copy, by delivering the same to him personally, at the city of Sandusky, in said county of Erie.

JOHN MACKEY.

Subscribed and sworn to before me, this 19th day of June, A. D. 1879.

COOPER K. WATSON,
Judge of the Court of Common Pleas.

44 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBERNEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

STATE OF OHIO, }
County of Erie, } *ss:*

On this 19th day of June, A. D. 1879, personally appeared before me the undersigned, Cooper K. Watson, judge of the court of common pleas within and for the county of Erie, and State of Ohio, at the city of Sandusky, said State, John Macky, who being by me first duly sworn, deposes and says, that on the 5th day of June, A. D. 1879, he served a copy of an order, of which the annexed is also a copy, on Ebenezer R. Ayres, one of the above named defendants, by delivering the same to him personally, at the city of Sandusky, county and State aforesaid.

JOHN MACKEY.

In witness whereof, I have hereto set my hand, and caused to be affixed the seal of my court, the day and year first above written.

[SEAL.] COOPER K. WATSON,
Judge of the Court of Common Pleas.

45 THE STATE OF OHIO, } ss:
Erie County, }

I, William J. Afflect, clerk of the court of common pleas within and for the said county of Erie, do hereby certify that said court of common pleas is a court of record; that the above named Cooper K. Watson is the judge of said court, and that his signature affixed to the foregoing instrument is in his own proper handwriting and was made by him.

In testimony whereof, I hereunto set my hand and affixed the seal of said court, at Sandusky, this 19th day of June, A. D. 1879.

[SEAL.] WM. J. AFFLECT, *Clerk.*

Endorsed: State of Michigan. The circuit court for the county of Huron. In chancery. Wm. McAlpine Wiswall *et al. vs.* Frederick S. Ayres *et al.* Order, etc. Filed June 26, 1879. John M. Cary, dep't. register.

46 *Replication of Charles E. Wiswall et al.*

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM MCALPINE WISWALL, EBENEZER S. WISWALL, TUISCO G. WISWALL, and ANN E. BAERMAN, Complainants,

vs.

EREDERICK S. AYRES *et al.*, Defendants.

The replication of Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Ayres, Tuisco G. Wiswall, and Ann E. Baerman, complainants, to the answer of Frederick S. Ayres and James S. Ayres, two of the above-named defendants.

These repliants, saving and reserving to themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be taken to the manifold insufficiencies of the said answer, for replication thereunto, say, that they will aver, maintain, and prove their bill of complaint to be true, certain and sufficient in the law, to be answered unto, and that the said answer is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatever in the said answer contained material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain and prove, as this honorable court shall direct, and pray as in and by this bill they have already prayed.

RICHARD WINSOR,
Solicitor for Complainants.

Filed June 26th, 1879. John M. Cary, dep. register.

47 *Answer of Frederick S. and Jas. S. Ayres.*

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM MCALPINE WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES *et al.*, Defendants.

The answer of Frederick S. Ayres and James S. Ayres to the complainants' bill.

The defendants, saving all objections and exceptions to the complainants' bill, answering, says:

First. They deny that on the twenty-seventh day of January, 1869, Frederick S. Ayres, Ebenezer Wiswall, and Charles G. Learned were indebted to Catherine S. Wiswall in the sum stated in said bill, or any other sum; and allege the fact to be, that the said Ayres, Learned, and Wiswall had then for some time constituted a firm by that name, and were indebted to the said Wiswall for moneys advanced on account of said firm, amounting at that time to twenty-one thousand dollars, which amount had been advanced by said Wiswall to pay a mortgtge upon the land of said firm, held by one Calvin P. Austin.

That said Wiswall, not wishing to take security in his own name, caused a bond and mortgage to be executed by said firm to his wife, Catherine Wiswall, and, for some reason of his own, had the consideration named therein, as stated in said bill, instead of the sum actually due him.

That the said Ayres, having full confidence in said Wiswall, executed said bond and mortgage at his request, but with the
48 understanding that only the amount actually due should be paid.

That said Catharine Wiswall never paid anything for said bond and mortgage, but held the same during her lifetime and up to the time of her assignment thereof, for the said Ebenezer Wiswall.

They deny that said mortgage was given to secure the purchase price of the lands described therein.

They admit the acknowledgement and recording of said mortgage, as stated in said bill.

They neither admit nor deny the assignment of said mortgage by said Catharine Wiswall, as stated in said bill, and leave the complainants to prove the same as they shall be advised.

They admit said Ebenezer Wiswall afterwards agreed to sell his interest in said lands to said Frederick S. Ayres, but whether the contract is correctly set out in said bill they are unable to state, and leave the complainants to prove the same.

They neither admit nor deny the giving of the bond by Frederick S. Ayres to Ebenezer Wiswall, alleged in said bill, and leave the complainants to prove the same, as they shall be advised.

They admit the sale by said Charles G. Learned and Jonas R. Learned of their interest in said lands to Ebenezer R. Ayres, but

whether their contract of sale is correctly set out in said bill they are unable to state, and leave the complainants to prove the same as they shall be advised.

They admit that the sums stated in said bill to have been paid on said bond and mortgage, but they deny that those are the only payments made thereon, and insist that other and large sums of money have been paid on said bond and mortgage, and they deny that there is now due thereon the sum of forty thousand dollars or thereabouts, and claim that the amount due thereon does not exceed the sum of twenty thousand two hundred and eighty-eight dollars, including interest, and the costs of this suit to date.

These defendants, further answering, say that on the twelfth day of June, A. D. 1879, they tendered to Richard Winsor, Esq., the solicitor for said complainants, the sum last aforesaid, in legal tender notes of the United States, and requested the said Winsor to accept the same in payment of the amount due on said bond and mortgage, and the interest thereon, and the costs of this suit to date; but to receive the same the said Winsor absolutely refused.

49 And these defendants, further answering, claim that by reason of said tender and refusal the amount due upon said bond and mortgage has ceased to be a lien upon said lands.

And the defendant, Frederick S. Ayres, who is personally liable to pay the amount due on said bond and mortgage, answering, says that he is ready and willing to pay upon said bond and mortgage the sum actually due thereon; and for that purpose, on the refusal of the said complainants' solicitor to receive the sum tendered as aforesaid, these defendants placed said sum in the hands of Allan Shelden, Esq., of the city of Detroit, subject to the order of said complainants or their solicitor, and notified the said complainants' solicitor of that fact.

The defendants aver that said sum remains in the hands of said Shelden, subject to said complainants' order as aforesaid, and that the same is all that is due upon said bond and mortgage for principal, interest, and costs.

And these defendants, further answering, say that said James S. Ayres is interested in the land described in said mortgage, under a contract between himself and Frederick S. Ayres, dated the twenty-third day of August, 1867, and is entitled under said contract to the undivided one-tenth thereof.

Without this that any other matter or thing by said bill contained, and not herein or hereby answered, is true.

These defendants say that the complainants have not in their said bill made or stated any case to entitle them to the relief prayed; and defendants ask the same benefit as if they had demurred thereto, and that they may be hence dismissed with their reasonable costs.

F. S. AYRES.
J. S. AYRES.

JAMES H. HALL,
Solicitor for Defendants.
ATKINSON & ATKINSON, *of Counsel.*

50 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, complainants.

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahern, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

On motion of Horace G. Snover, solicitor for said defendants, Ebenezer Wiswall and Charles G. Learned, ordered that the appearance of said defendants be, and the same is hereby, entered, and on like motion it is further ordered that the complainants serve upon the said solicitor a copy of their bill of complaint filed in this cause within fifteen days after service upon them or their solicitor of notice of this order, or in default thereof that said bill be dismissed with costs.

To RICHARD WINSOR, *Solicitor for Complainants.*

Please take notice that the foregoing is a true copy of an order, this day entered in the above entitled cause.

Dated June 17, 1879. HORACE G. SNOVER,
Solicitor for Defendants.

Endorsed: In the circuit court for the county of Huron. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Order of appearance of def't, C. G. Learned and Ebenezer Wiswall. Entered and filed June 17th, 1879. John M. Cary.

51 The Circuit Court for the County of Huron. In Chancery.

CHARLE E. WISWALL *et al. vs.* FREDERICK S. AYRES *et al.*

On motion of Atkinson & Atkinson, of counsel for the defendants, ordered that the time for answering be extended for forty (40) days.

LEXINGTON, 28*th May*, 1879. LEVI L. WIXSON,
Circuit Judge.

Endorsed: The circuit court for the county of Huron. In chancery. Wiswall *et al. vs.* Ayres *et al.* Order extending time to answer. Filed June 3d, 1879. John M. Cary, dept'y reg. James H. Hall, solicitor for defendants. A. & A. of counsel.

52 STATE OF MICHIGAN.

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahern, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

On motion of James H. Hall, solicitor for said defendants, Frederick S. Ayres and James S. Ayres, ordered that the appearance of said defendants, Frederick S. Ayres and James S. Ayres, be, and the same is hereby, entered. And on like motion, it is further ordered that the complainants serve upon the said solicitor a copy of their bill of complaint filed in this cause within fifteen days after service upon them or their solicitor of notice of this order, or in default thereof that said bill be dismissed with costs.

To RICHARD WINSOR, *Solicitor for Complainants:*

Please take notice that the foregoing is a true copy of an order this day entered in the above entitled cause.

Dated May 10, A. D. 1879. JAMES S. HALL,
Solicitor for Defendants, Frederick S. Ayres and James S. Ayres.

JOHN ATKINSON, *Of Counsel.*

Endorsed: The circuit court for the county of Huron, Mich. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.*, defendants. Order for copy of bill and notice. Received, filed, and entered in book of common orders No. one, at 12 o'clock m., page 144, and filed this 10 day of May, 1879. John M. Cary, dep'y register. James H. Hall, solicitor for defendants, Frederick S. Ayres and James S. Ayres. John Atkinson, of counsel.

53 Know all men by these presents, that I, Jonas R. Learned, of Port Austin, Huron county, Michigan, *are* held and firmly bound unto Frederick S. Ayres, Ebenezer Wiswall, Charles G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde,

Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, or to their certain executors, administrators, or assigns, for which payment well and truly to be made I bind myself and my heirs, executors, or administrators, jointly and severally, firmly by these presents.

Sealed this 15th day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

The condition of this obligation is such that whereas Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman have filed their bill of complaint in the circuit court for the county of Huron against Frederick S. Ayres, Ebenezer Wiswall, Charles G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybe, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards:

54 Now, therefore, if the above bounden shall pay all costs that shall be decreed against the complainants in such case, then this obligation shall be void; otherwise in full force and effect.

JONAS R. LEARNED. [L. S.]

In presence of—

HORACE G. SNOVER.

I approve of the foregoing bond and of the surety thereto. Dated April 15, A. D. 1879.

CHARLES E. THOMPSON,
Register in Chancery.

Endorsed: In the circuit court for the county of Huron. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Bond for costs. Filed April 15, 1879. Charles E. Thompson, register in chancery.

55 STATE OF MICHIGAN:

The Circuit Court for the County of Huron. In Chancery.

In the name of the people of the State of Michigan to Frederick S. Ayres, Ebenezer Wiswall, Charles G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Greeting:

You are hereby commanded to appear before the circuit court

for the county of Huron, in chancery, at the court house, in the village of Bad Axe, on the 26th day of April, A. D. 1879, then and there to answer unto a bill of complaint exhibited against you, as defendants, by Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman as complainants, and this you shall in nowise omit under the penalty of one thousand dollars.

Witness the Hon. Edward W. Harris, circuit judge for the county of Huron, at the court house in Bad Axe, the 15th day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

CHARLES E. THOMPSON, *Register.*
By JOHN M. CARY, *Dep'y Register.*

RICHARD WINSOR,
Solicitor for Complainants.

56 STATE OF MICHIGAN, } ss:
County of Huron, }

I hereby certify and return, that on the 18th day of April, A. D. 1879, I served the within subpœnapersonally on Frederick S. Ayres, Charles G. Learned, James S. Ayres, Peter Smeader, Jr., John Deschamps, Leander Maybie, Julius Empkie, Frederick Empkie, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, James Ahearn, Peter Patterson, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards.

On the 19th day of April, A. D. 1879, on John Wallace, Jr., James Hall, Albert Botowitz, John Copeland, Mitchell Legassa, John Babindererde, Rufus Edmonds. And on the 21st day of April, A. D. 1879, on Samuel Parks, by delivering to each of said defendants a true copy of the within subpœaa, inscribed "copy," and subscribed "Richard Winsor, complainants' solicitor." And at the same time I showed each of the said defendants the original subpœna, with the seal of the court impressed thereon.

I hereby certify and return, that on the 18th day of April, A. D. 1879, I served the within subpœna on the First Presbyterian Church, of Port Austin, Michigan, by delivering to William F. Clark, Jr., one of the trustees of said church, a true copy of the within subpœna inscribed "copy," and subscribed "Richard Winsor, complainants' solicitor." And at the same time I showed William F. Clark the original subpœna, with the seal of the court impressed thereon.

WILLIAM T. CHAPPELL, *Sheriff.*

My fees—	
Service	$8 25
Travel	4 00
Copies	3 10
Total	$15 35

Endorsed: In the circuit court for the county of Huron. In

Chancery. Charles E. Wiswall *et al.*, complainants, *vs.* Frederick S. Ayers *et al.*, defendants. Writ of subpœna. Filed April 26th, A. D. 1879. Charles E. Thompson, Register. Richard Winsor, complainants' solicitor.

57

Complainants' Bill.

STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

To the Circuit Court for the County of Huron. In Chancery.

Your orators, Charles E. Wiswall, William McAlpine Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, all of the State of New York, respectfully show unto the court, that on or about the 27th day of January, in the year of our Lord one thousand eight hundred and sixty-nine, Frederick S. Ayres, Ebenezer Wiswall, and Charles G. Learned, being indebted to Catherine A. Wiswall, of West Troy, New York, in the sum of forty thousand one hundred and five and 45-100 dollars, did make and execute under their hands and seals—James S. Ayres joining therein as surety—and deliver to the said Catherine A. Wiswall, a certain bond, which was in words and figures substantially as follows, to wit:

"Know all men by these presents, that we, Frederick S. Ayres and Charles G. Learned, of Port Austin, Michigan, and Ebenezer Wiswall, of West Troy, New York, are held and firmly bound unto Catherine E. Wiswall, of West Troy, New York, in the sum of eighty thousand dollars, good and lawful money of the United States, to be paid to the said Catherine Wiswall, her executors, administrators, and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with our seals, dated the 27th day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

"The condition of this obligation is such, that if the above bounden Frederick S. Ayres, Charles G. Learned, and Ebenezer Wis-
58 wall, their heirs, executors, and administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above named Catherine A. Wiswall, her executors, administrators, and assigns, the just and full sum of money that may be legally due on a certain mortgage dated January twenty-seventh, one thousand eight hundred and sixty-nine, and executed by Frederick S. Ayres, Eben. Wiswall, Nancy Ayres, Charles G. Learned, and Maria Learned, unto Catherine A. Wiswall, and recorded in the clerk's office of Huron county, Michigan, March 11, 1869, at 11 o'clock a. m., then this obligation to be void and of no effect, or else to remain in full force and virtue.

"In witness whereof, we have hereunto affixed our hands and seals the day and year first above written.

"EBENEZER WISWALL. [SEAL.]
"F. S. AYRES. [SEAL.]
"CHAS. G. LEARNED. [SEAL.]
"(As security), J. S. AYRES. [SEAL.]

"Witnessed by—
"J. S. AYRES.
"C. E. WISWALL."

And your orators further show unto the court that the said Frederick S. Ayres and Nancy Ayres, his wife, and the said Charles G. Learned and Maria Learned, his wife, and the said Ebenezer Wiswall, on the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and sixty-nine, in order to secure to said Catherine Wiswall the payment of the sum of forty thousand one hundred and five and 43-100 dollars, evidenced by their bond of even date therewith, payable two years from date, with interest thereon at the rate of seven per cent. per annum, payable semi-annually, did execute, under their hands and seals, and did afterwards acknowledge and deliver to the said Catherine A. Wiswall, a certain indenture of mortgage, bearing date the day and year last aforesaid, and thereby, for the consideration of forty thousand one hundred and five and 43-100 dollars to the said Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, in hand paid by the said Catherine A. Wiswall, the said Frederick S. Ayres and Nancy, his wife, and the said Charles G. Learned and Maria Learned, his wife, and the said Ebenezer Wiswall, the parties of the first part in and to said indenture of mortgage, did grant, bargain, sell, and convey unto the said Catherine A. Wiswall, the party of the second part in the said indenturn, and to her heirs and assigns forever, the following described premises, situate in the county of
59 Huron, in the State of Michigan, and known as the Port Austin mill property, to wit:

Description.	*Section.*	*Town. N.*	*Range E.*
The s part of s e fractional q	22	19	13
The s w q of n e q, s e q of n w q, and e h of s w q	26	19	13
The w h of n e q, n w q, & n w q of s w q	27	19	13
The s h of n w q, and w h of s w q	28	19	13
The n w q of n e q, s e q of n e q, and e part of n w q	29	19	13
The w h of s w q and s e q	29	19	13
The & n e q of s e q	30	19	13
The e h of n e q and s e q	31	19	13
The n e q, e h of n w q, & e h of s w q	32	19	13
The w h of s e q, and s e q of s e q	32	19	13
The s e q of n w q, and s e q	33	19	13
The s h of s w q	34	19	13
The s e q of s e q	36	19	13
The e part of n e q, and n e q of s e q	1	18	13
The n part of n e q, & n e fl q of n w fl q	3	18	13
The w fl h of n w fl q, and w h of s w q	3	18	13
The s e q of s w q and s w q of s e q	3	18	13
The n e q of n h of n w q, and s e q	4	18	13
The e h of n e q, and n w q of n e q	5	18	13

Description.	*Section.*	*Town. N.*	*Range E.*
The e h of s e q	5	18	13
The n e q, n e q of n w q, and s w q of s w q	6	18	13
The e h of s w q, and w h of s e q	6	18	13
The w h of n e q, and e h of n w q	7	18	13
The n w q of n w q, s w q, & w h of s e q	7	18	13
The e h of n e q	8	18	13
All of	9	18	13
The n w q, n w q of s w q, and s h of s w q	10	18	13
The w h of s w q	13	18	13
The e h of s e q	14	18	13
The n w q, s w q of s w q, & n e q of s w q	15	18	13
The s e q of s e q	17	18	13
The n h of n e q, n w fl q, and n fl part of s w fl q	18	18	13
The n e q of n e q, and s e q of s e q	20	18	13
The n w q of n w q	23	18	13
The n w q of n w q	28	18	13
The n e q of n e q	29	18	13
60 The e h of s e q	36	18	13
The w fl part of n w fl q	6	18	14
The n h of n e q, and s w q of n e q	19	18	14
The s e q of n w q, and s w fl q	19	18	14
The n e q of n w q	30	18	14
The e part of n e fl q	1	17	13
The n e q of n e q	12	17	13
The w fl part of s w fl q	6	17	14
The n part of n w fl q	7	17	14
The n h of n e q, and h of n w q	17	17	14
The s w q of s w q	31	19	14
The w h of s e q	25	19	12
Lots Nos 2 and 3	25	19	12
The n w q of n w q	36	19	12
The e h of s w q	1	18	12
The n w q of n e q	12	18	12
The n e q of n e q	13	18	12
The s h of s e q	25	18	12
The n h of n e q	36	18	12

Said indenture of mortgage was upon the express condition that the same shall be null and void if the said Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall should and did well and truly pay, or cause to be paid, the sum of forty thousand one hundred and five and $\frac{43}{100}$ dollars in two years from the date thereof, with interest at the rate of seven per cent. per annum, payable semi-annually to Catharine A. Wiswall, her executors, administrators, or assigns, according to the terms and conditions of said bond and mortgage, which bond and mortgage were subsequently lost by said Catharine A. Wiswall, and are supposed to have been stolen.

Your orators further show that said indenture of mortgage was given to secure the purchase price of the lands mortgaged, the

mortgagors being permitted to purchase the land at mortgage sale, and that they afterwards gave this mortgage to secure the purchase price agreed upon.

The execution of said mortgage was on the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and sixty-nine, duly acknowledged by the said Frederick S. Ayres, Nancy Ayres, his wife, and Ebenezer Wiswall, on the same
61 day, before George O. Selkirk, clerk of the court of common pleas of Erie county, Ohio, duly authorized to take such acknowledgment, the certificate of such acknowledgment being duly indorsed on said mortgage, and duly acknowledged by the said Charles G. Learned and Maria Learned, his wife, on the eleventh day of March following, before Edmond Cole, a notary public, duly authorized to take such acknowledgment, the certificate of such acknowledgment being duly endorsed on said mortgage.

And your orators further show unto the court, that afterwards, to wit, on the eleventh day of March, A. D. 1869, the said indenture of mortgage was in due form of law recorded in the office of the register of deeds, in the county of Huron and State of Michigan, in liber C of mortgages, on page 240. That afterwards, to wit, on the 25th day of February, A. D. 1874, the said Catharine A. Wiswall assigned the said mortgage and bond to your orators, by an instrument in writing, which instrument was in words and figures substantially as follows, to wit:

"Know all men by these presents, that I, Catharine A. Wiswall, of the village of West Troy, Albany county, N. Y., of the first part, in consideration of the sum of one dollar to me in hand paid by Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, of the second part, at or before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, resigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said parties of the second part a certain indenture of mortgage, bearing date the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and sixty-nine, made by Frederick S. Ayres, Nancy Ayres, his wife, Charles G. Learned, and Maria Learned, his wife, and Ebenezer Wiswall, and which said mortgage was recorded in the register's office of Huron county, Michigan, on the eleventh day of March, in the year 1869, in book of mortgages No. C, at page 240, &c., together with the bond or obligation herein described, and the money due and to grow due thereon, with the interest, to have and to hold the same unto the said parties of the second part for their use and benefit, subject only to the provisions in the said indenture of mortgage mentioned; and I do hereby make, constitute, and appoint the said parties of the second part my true and lawful attorneys, irrevocable in my name or otherwise, but at
62 their own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the said money and interest, and in case of payment to discharge the same as freely as I might or could do if these presents were not made. And I do

hereby covenant to and with the said parties of the second part, that there is now due and owing upon said bond and mortgage the sum of —— dollars and cents, with interest from the —— day of ——, 18—, and that I have a good right to sell and assign the same as aforesaid.

"In witness whereof I have hereunto set my hand and seal this twenty-fifth day of February, in the year one thousand eight hundred and seventy four.

"CATHARINE A. WISWALL."

Signed and delivered in the presence of—
GEORGE S. LEARNED.
GEORGE L. POLLOCK.

STATE OF NEW YORK, *Rensellaer County*, } ss:

On the twenty-fifth day of February, one thousaud eight hundred and seventy-four, before me, a commissioner for the State of Michigan, appeared Catharine A. Wiswall, to me well known to be the person described in and who executed the within assignment, and acknowledged that she executed the same.

A. G. HALSTEAD, [SEAL.]
Commissioner of the State of Michigan, Troy, N. Y.

Your orators further show that afterwards, to wit, on the second day of June, A. D. 1874, the said assignment was duly recorded in the register's office of said county of Huron, in liber C of mortgages, on pages 253 and 254.

Your orators further show, that on the 31st day of October, A. D. 1871, the said Ebenezer Wiswall contracted to sell all his right, title, and interest in and to the real and personal property, rights, and credits of the firm of Ayres, Learned & Wiswall (which property of the firm of Ayres, Learned & Wiswall included the lands covered by said mortgage) to the said Frederick S. Ayres, subject to the payment of the mortgage aforesaid and interest, which contract was in words and figures substantially as follows, to wit:

"This contract, made this 31st day of October, A. D. 1871, be-
63 tween Ebenezer Wiswall, of West Troy, Albany county, New York, of the first part, and Frederick S. Ayres, of Port Austin, in the State of Michigan, of the second part: Whereas, the parties hereto and Charles G. Learned, of Port Austin, in the State of Michigan, have been for a number of years, and are now, partners in trade, under the name of Ayres, Learned & Wiswall, of Port Austin aforesaid, and as such own a large amount and quantity of real and personal estate in the State of Michigan, and personal property in the State of Ohio, and notes, bonds, and mortgages and accounts against sundry persons and firms:

And whereas, on the books of said firm is an account against said party of the first part for $14,081.30, and an account against Charles E. Wiswall, which is included in said amount, and against which is an offset of $348.47, leaving $13,732.83 balance:

And whereas, the said Ebenezer Wiswall has agreed to sell, and he doth hereby sell, to the said Federick S. Ayers, the party of the second part hereto, all his the said party of the first part's interest in and to all the said real and personal estate, rights, and credits in which he has any interest as one of the partners of said firm, be the same more or less, upon the terms and conditions following, that is to say: for the sum of $31,449.96, payable as follows: cash this day, $7,500.00; the sum of $7,500.00 and interest thereon at 7 per cent. on the first day of December next; the sum of $6,238.93, with the interest thereon at seven per cent., nine months from this date; the sum of five thousand one hundered and five dollars and fifty-one cents and interest, twelve months from this day; and the like sum with interest eighteen months from this day. And the said party of the second part assumes and is to arrange and settle the said sum of $13,732.83, the balance of said accounts against the party of the first part and Charles E. Wiswall; and the said party of the second part also agrees to pay, satisfy, and discharge and save harmless the party of the first part from all the debts and liabilities of said firm, for which the said party of the first part is or shall be liable as such partner in any way, and for such payment and indemnity the party of the second part has made, executed, and delivered to party of first part his bond of this date.

And for the payment of the $7,500 and interest payable on the first of December next, and the sum of $5,105.51 at twelve and eighteen months with interest, he has given his promissory notes to party of the first part; and for the payment of the $6,238.93 without interest, and which note is also endorsed by Messrs.
64 Moore, Foote & Co., and has made and delivered to party of the first part his note for $327.55, at nine months, being the interest on $6,238.93 for nine months.

And the said party of the first part hereby agrees, that upon the payment of said sum of $31,449.96, and as aforesaid, and upon the settlement and discharge of said sum of $13,732.83, he will make, execute, acknowledge and deliver—his wife joining therein—a good and sufficient deed, conveying to the party of the second part, his heirs and assigns, all his interest in the said real estate. Such deed, however, shall be subject to all liens and encumbrances thereon and convenants only against the acts of the party of the first part for his personal benefit.

And in case of the failure of the party of the second part to pay said purchase price, or any part thereof, at the time and times above mentioned, and in case such default shall continue for the space of three months, then after the expiration of said three months the party of the first part may take possession of said property, and shall be reinstated therein as of his own property, and any payment which shall have been made shall be declared forfeited as damages for non-performance on the part of second party; or the said party of the first part may proceed and collect the balance of said purchase money either by suit on said notes or by foreclosure of this contract for such unpaid purchase money. It being also understood, that the above sale is made also subject to a mortgage given by the

parties hereto and said Charles G. Learned to the wife of the party of the first part, for $40,105.03 and interest, which is to be paid by the said party of second part and said Learned; and as between the parties hereto, the same is allowed and taken as part of the purchase price of said premises.

EBENEZER WISWALL, [SEAL.]
F. S. AYRES, [SEAL.]

In presence of—
J. W. MASON,
D. C. HOLBROOK.

STATE OF MICHIGAN, *County of Huron:*

On this 31st day of October, 1871, personally appeared before me the above named Ebenezer Wiswall and Frederick S. Ayres, and they severally acknowledged that they executed the same as their free act and deed.

B. T. PRENTIS,
Notary Public for Wayne County.

65 And your orators further show, that at the same time the said Frederick S. Ayers gave his written obligation to perform said contract as entered into with said Ebenezer Wiswall, which bond was in words and figures substantially as follows, to wit:

Know all men by these presents, That I, Frederick S. Ayres, of Port Austin, Michigan, am held and firmly bound unto Ebenezer Wiswall, of West Troy, New York, in the sum of forty thousand dollars, lawful money of the United States of America, to be paid to the said Ebenezer Wiswall, or to his certain attorneys, heirs, executors, administrators, or assigns, to which payment well and truly to be made I bind my heirs, executors, and administrators, and each and every of them, firmly by these presents.

Sealed with my seal, dated the 31st day of October, one thousand eight hundred and seventy-one.

The condition of this obligation is such, that, whereas the said parties hereto, and Charles G. Learned, have been and are partners under the name and style of Ayres, Learned & Wiswall, of Port Austin, Michigan; and whereas, the said Wiswall has agreed in writing to sell said Ayres all his the said Wiswall's interest in said firm, and all the property thereof, real and personal, and said Ayres assumes and agrees to pay, save harmless, and indemnify said Wiswall from all the debts and liabilities of said firm, and for all matters connected therewith, and from all costs, charges, trouble, and expenses he may be put to by reason thereof.

Now, therefore, if the said Frederick S. Ayres shall well and truly pay, and save harmless and indemnify said Ebenezer Wiswall, his heirs, executors, and administrators, from all such debts and liabilities from all costs, charges, trouble, and expenses he may be put to by reason of such debts, then this obligation shall be void; otherwise of full effect and virtue.

F. S. AYRES. [SEAL.]

Your orators further show unto the court, that afterwards, to wit, on the 20th day of October, A. D. 1874, the said Charles G. Learned, and one Jonas R. Learned, who was interested with him in certain personal property, contracted to sell and did sell to Ebenezer R. Ayres, of Sandusky, Ohio, all their interest in and to the real and personal estate, rights and credits of the firm
66 of Ayres, Learned & Co., said real property being a one-fourth interest in the property described in said mortgage, together with numerous other descriptions of land; which contract was in words and figures substantially as follows:

This contract, made this 20th day of October, A. D. 1874, between Jonas R. Learned and Charles G. Learned, of Port Austin, Michigan, of the first part, and Ebenezer R. Ayres, of Sandusky, Ohio, of the second part. Whereas, Jonas R. Learned and Charles G. Learned are now owners of a quarter interest of the real and personal property belonging to the firm of Ayres, Learned & Co., doing business at Port Austin, Michigan; and whereas the said Jonas R. Learned and Charles G. Learned have agreed to sell, and do hereby sell, to the said Ebenezer R. Ayres, the party of the second part hereto, all their the said party of the first part's interest in and to all the said real and personal estate, rights, and credits, in which they have any interest as owners of said one quarter of the real and personal property of the firm of Ayres, Learned & Co., be the same more or less, except in ($30,000) thirty thousand dollars worth herein, taken as part payment, upon the terms and conditions following, that is to say, for the sum of (40,000) forty thousand dollars, payable as follows: Certain real and personal property in Port Austin, taken at a cash valuation of ($30,000) thirty thousand dollars, and the notes of said E. R. Ayres (indorsed by F. S. Ayres and J. S. Ayres, or in their firm name, which may be adopted by them and E. R. Ayres in the conduct of their business at Port Austin, M.,) for five thousand dollars each, dated October 20, 1874, with interest at seven per cent., payable annually, in five and six years after date, at Port Austin, Michigan. Upon the settlement and payment of the said sum of forty thousand dollars, in the manner hereinbefore stated, they, the said party of the first part, will make, execute, and acknowledge and deliver, their wives joining therein, a good and sufficient deed conveying to the party of the second part, and his heirs and assigns, all their interest in the said real estate. Such deed, however, shall be subject to a mortgage given by Eben. Wiswall, Frederick S. Ayres, and Charles G. Learned to the wife of said Eben. Wiswall for $40,105.03, and interest, which is to be paid by the said party of the second part and said F. S. Ayres and J. S. Ayres; and as between the said parties hereto, the same is allowed and taken as part of the purchase price of said premises. Said E. R. Ayres agrees to pay the proportion of
67 said J. R. Learned and C. G. Learned's indebtedness of Ayres, Learned & Co., as may appear by the books of said Ayres, Learned & Co.

CHAS. G. LEARNED. [SEAL.]
JONAS R. LEARNED. [SEAL.]
EBENEZER R. AYRES. [SEAL.]

In presence of—
R. WINSOR.
J. S. AYRES.

STATE OF MICHIGAN, *County of Huron*, } ss:

On this 20th day of October, 1874, personally appeared before me the above-named Jonas R. Learned, Charles G. Learned, and Ebenezer R. Ayres, and they severally acknowledged that they executed the same as their free act and deed.

RICHARD WINSOR,
Notary Public.

Your orators further show that afterwards, to wit, on the 20th day of October, 1874, in pursuance of the contract last before mentioned, the said Charles G. Learned and Maria Learned, his wife, did convey by deed, under their hands and seals, subject to the payment of a certain mortgage made January 27, 1869, by Frederick S. Ayres, Nancy Ayres, Charles G. Learned, Maria Learned, and Eben Wiswall, to Catherine A. Wiswall, together with numerous other lands, all their right, title, and interest in and to all the lands described in said mortgage, except the following descriptions, to wit:

Description.	*Section.*	*Town N.*	*Range E.*
The s e q of s e q and n w of n e q	12	18	12
The s h of s e q	25	18	12
The n h of n e q	36	18	12
The w h of s e q	25	19	12
The n w q of n w q	36	19	12
The e h of n w q	27	19	13
The n w q of n e q, s e q of n e q, and e h of s e q	29	19	13
The n e q of s e q, & s h of n e q of n e q	31	19	13
The s e q of n w q	33	19	13
The s e q of s w q	34	19	13

All in Huron county, Michigan, and except lands before then sold to sundry persons, herein also set forth.

68 That the execution of said deed was, on the 20th day of October, A. D. 1874, duly acknowledged by the said Charles G. Learned and Maria Learned before J. R. Learned, a notary public, duly authorized to take such acknowledgment, on the 23d day of August, 1875, the certificate of such acknowledgment being duly endorsed on said mortgage, and that said deed was afterwards duly recorded in the office of the register of deeds of said Huron county, in liber F of deeds, on pages 36, 37, and 38.

Your orators further show that afterwards, to wit, on the fifth day of August, A. D. 1875, the said Frederick S. Ayres and James S. Ayres, in pursuance of the contract last above mentioned, and as part payment of the purchase price therein mentioned,

conveyed by warranty deed, their wives joining therein, together with numerous other lands, the lands last above particularly described to the said Charles G. Learned; which deed was duly acknowledged on the 7th day of September, 1875, before Jonas R. Learned, a notary public, duly authorized to take such acknowledgment, and duly recorded in the register's office of Huron county, in liber F of deeds, on pages 38 and 39, as in and by said deed now in possession of your orators and ready to be produced and proved as this court may direct, will more fully and at large appear, and to which, when so produced and proved, your orators, for greater certainty, pray leave to refer.

And your orators further show unto the court that they have been paid upon said bond and mortgage the following sums of money, at the dates mentioned, to wit:

Feb'y 27, 1872	$8,000 00
April 3, 1876	1,497 00
October 2, 1876	1,197 00
October 29, 1877	999 00
Novem'r 25, 1878	1,289 29
June 14, 1873	10,000 00
May 1, 1876	1,499 00
November 3, 1876	1,197 00
Decem'r 14, 1877	5,000 00

Your orators further show that there is now due and unpaid on said bond and mortgage the sum of forty thousnnd dollars, or thereabouts.

And your orators further show that no proceedings at law have been had to recover the debt secured by the said bond and mortgage, or any part thereof.

And your orators further show show that they have caused examination to be made of the record of deeds and mortgages in the office of the register of deeds of the county of Huron and State of Michigan, where said mortgaged premises are situated
69 from which it appears, and your orators expressly charge the fact so to be, that James S. Ayres, Ebenezer R. Ayres, Peter Smeeder, Jr., John Wallace, Jr., James Hall, Albert Botowitz, John Copeland, Frederick Empkie, Julius Empkie, Peter Wrobliski, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Samuel Parks, The Township of Port Austin, Huron county, Michigan, George Brown, John Babindererde, Charles Empkie, Jacob Helfferich, James Brebner, Isabella Skene, George H. Gregory, Peter Patterson, Mark Carrington, Otis B. Williams, James Kerr, Mitchell Legassa, The First Presbyterian Church of Port Austin, Michigan, Leander Maybie, John Deschamps, have rights and interests in some of the premises in said mortgage, as subsequent purchasers or incumbrancers or otherwise.

And your orators further show that from examination of the record of deeds in said register's office a part of said mortgaged lands appear to have been transferred since the making of said

mortgage; the descriptions, present owners thereof, and date of transfer, appearing by the following schedule:

The w h of n e q of n e q, section 6, T 18 N, R 13 E. Peter Smeeder, Jr. June 20, 1878.

The n e q of s e q, section 1, T 18 N, R 13 E. John Wallace, Jr. September 7, 1877.

The w h of n e q, section 27, T 19 N, R 13 E. James Hall. December 27, 1876.

Lot n side of Spring street, in the village of Port Austin. John Deschamps. December 20, 1876.

The s e q of s e q, section 5, T 18 N, R 13 E. Albert Botowitz. June 8, 1875.

The s w q of n e q and s e q of s w q, section 26, T 19 N, R 13 E. John Copeland. May 8, 1875.

Lot in w h of s w q, near Catholic Church, in Port Austin, section 29, T 19 N, R 13 E. Leander Maybie. March 7, 1875.

The e h of s w q, section 1, T 18 N, R 12 E. Julius Empkie and Frederick Empkie. January 25, 1875.

Lot on south side of State street, in the village of Port Austin, section 30, T 19 N, R 13 E. The First Presbyterian Church of Port Austin, Michigan. June 1, 1874.

Lots 10 and 12, on north side of Spring street, in the village of Port Austin, section 29, T 19 N, R 13 E. Mitchell Legassa. May 14, 1874.

The s w q of s e q, section 32, T 19 N, R 13 E. Peter Wrobliski. March 9, 1874.

70 Lot on corner of Lake and Spring streets, in village of Port Austin, Michigan, being 100 feet on Spring street and 50 feet on Lake street, being part of Winsor House property, section 30, T 19 N, R 13 E. Otis B. Williams and James Kerr. February 10, 1874.

Lot on northwest corner Lake and State streets, being 50 feet on Lake and 100 feet on State, now occupied by T. Winsor & Co., section 30, T 19 N, R 13 E. Mark Carrington. February 9, 1874.

The n w q of n e q, section 4, T 18 N, R 13 E. August Schwarnitz. December 25, 1873.

The n w q of s w q, section 27, T 19 N, R 13 E. Nicholas Kramer. December 22, 1873.

Lot on Line street, in the village of Port Austin, and now occupied by O. C. Comstock, section 30, T 19 N, R 13 E, Nicholas Kramer. December 22, 1873.

The s w q of s w q, section 9, T 18 N, R 13 E. Rufus Edmonds. December 12, 1873.

Lot on s w corner of Line and Spring street, in the village of Port Austin, section 30, T 19 N, R 13 E. Nicholas Kramer. September 18, 1873.

The n e q of n e q, section 13, T 18 N, R 12 E. James Ahearn. July 18, 1873.

The n h of s w q, section 9, T 18 N, R 13 E. Samuel Parks. March 8, 1873.

Lots 6 and 8 in Port Austin village, east of Bird creek, section 29, T 19 N, R 13 E. Peter Patterson. January 4, 1873.

Six acres in n w q of s e q, section 29, T 19 N, R 13 E. George Brown. August 29, 1872.

Six acres in n w q of s e q, section 29, T 19 N, R 13 E. The Board of Health of Port Austin, Huron county, Michigan. August 29, 1872.

The n h of s w q, section 7, T 18 N, R 13 E. John Babindererde. May 14, 1872.

Thirteen acres of land west of road in s w q of s w q, section 6, T 18 N, R 13 E. Charles Empkie. April 29, 1872.

Lot on east side of Lake street, in the village of Port Austin, now occupied by Frank Klebba, section 30, T 19 N, R 13 E. George H. Gregory. April 1, 1872.

The n w q of n e q, section 18, T 18 N, R 13 E. Jacob Helfferich. March 16, 1872.

Lot on north side of Spring street, in the village of Port Austin, occupied by R. Smith, section 30, T 19 N, R 13 E. James Brebner. August 8, 1870.

71 All of lot on west side Lake street, in Port Austin, Michigan, occupied by George Skene, section 30, T. 19 N, R. 13 E. Isabella Skene. August 8, 1870.

And your orators further show unto the court that they are informed and believe, and so charge the facts to be, that Bennet Richards, Richard Winsor, and Horace G. Snover have rights and interest in some of the lands covered by said mortgage, as subsequent purchasers under contract from the mortgagees in said mortgage, or parties holding under or claiming through them, or some of them.

And your orators further show unto the court that the firm of Ayres & Co., consisting of the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, contracted to sell, and did sell, to Richard Winsor and Horace G. Snover, on November 1, 1877, a lot 50 feet wide, on Lake street, and 100 feet deep, adjoining the lot now owned by Otis B. Williams and James Kerr, in the village of Port Austin, Mich., said lot being now occupied by said Williams & Kerr; and a lot immediately north of what is known as the Masonic Association lot, now owned by Mark Carrington, being 24 feet on Lake street and 100 feet deep, and now occupied by said Richard Winsor and Horace G. Snover, on which said lots large amounts have been paid, and all that is due by the contract of sale of said lands.

And that, as your orators are informed and verily believe, the defendants, Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, composing the firm of Ayres, Learned & Wiswall, contracted to sell, and did sell, to Bennett Richards, on April 1, 1869, the lot on the corner of Lake and Spring streets, now occupied by said Bennett Richards, and described in said contract as lot number 1, according to Ayres, Learned & Wiswall's plat of a part of the village of Port Austin, which contract, as your orators are informed and believe, has long since been paid in full.

Your orators further show that they are informed and believe, and so charge the facts to be, that the mortgagees in said mortgage, and James S. Ayres and Ebenezer R. Ayres, claiming under them, or some of them, have entered into written contracts to sell the following descriptions of land, being lands covered by said mortgae, to wit:

Description	Section.	Town. N.	Range E.
The n e q of n e q, and n h of n w q ------	4	18	13
The n w q of n e q, and n e q of n e q------	5	18	13
The s e q of n e q, and n e q of s e q ------	5	18	13
The s h of n e q, n e q of n e q------	6	18	13
72 All of the n w q of n e q east of road_	6	18	13
The w h of s e q------------------	7	18	13
The e h of n e q------------------------	8	18	13
The n h of n w q, and s h of n w q---------	9	18	13
The n h of n w q------------------------	18	18	13
The e h of s w q------------------------	26	19	13
The s w q of n w q----------------------	27	19	13
The s e q of s w q, and s e q of s e q------	32	19	13
The s e q of s e q, s w q of s e q and n w q of s e q------------------------	33	19	13
The s w q of s w q, and s e q of s w q-----	34	19	13
The s e q of s e q------------------	36	18	13

Upon which contracts of sale from time to time they have received large payments, but your orators are not informed to whom said lands have been sold, or the sum of purchase-money respectively paid thereon; and ask that the defendants Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, specifically set forth in their answer, whether such lands were sold under contract or not, the date of sale, to whom sold, the sum sold for, and the amount paid upon each contract of sale, and when paid, and further specifically set forth, whether any other of said lands have been alienated, and, if so, the date when, to whom, and the character of the alienation thereof.

Your orators further show that the northeast quarter of southwest qurter of section 6, in town. 18 north, of range 13 east, embraced said mortgage was sold by the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, and conveyed by warranty deed to Charles Ball, on October 2, 1878, for the sum of $800.00; and that on the 25th day of November, 1878, said sum of $800.00 was paid over to these complainants, being embraced in the payment of $1,289.29 of that date; whereupon these complainants executed a release of said description of land from said mortgage; that said sum of $800.00 was the full value of said land at the time said release was executed.

Your orators further show that there is no such land as lots Nos. 2 and 3 in section 25, of town. 19 north, of range 12 east, described in the commissioner's deed referred to in said mortgage.

Your orators further show that at the time of the execution of

said mortgage it was made to include or embrace a number of descriptions of land that did not belong to the mortgagors, and of which they have not since become the owners, the description
73 of which lands, and the owners thereof, are as follows:

The s w q of n e q of section 18, T 18 N, of R 13 E, owned by Jacob Helfferich; the n h of s w q of section 30, T 19 N, of R 13 E, owned by John W. Kimball; the n e q of s e q of section 23, T 19 N, of R 13 E, owned by James Ryan; the n e q of s e q of section 34, T 19 N, of R 13 E, owned by Jacob Miller.

Your orators therefore ask the aid of this court in the premises, and that the above-named Frederick S. Ayres, Ebenezer Wiswall, Charles G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeeder, Jr., John Wallace, Jr., James Hall, Albert Botowitz, John Copeland, Frederick Empkie, Julius Empkie, Peter Wrobliski, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Samuel Parks, The Township of Port Austin, Huron county, Michigan, George Brown, John Babindererde, Charles Empkie, Jacob Helfferich, James Brebner, Isabella Skene, George H. Gregory, Peter Patterson, Mark Carrington, Otis B. Williams, James Kerr, Mitchell Legassa, The First Presbyterian Church of Port Austin, Michigan, Leander Maybie, John Deschamps, and Bennett Richards, the defendants in this suit, may appear and answer this your orators' bill, without oath, (answer upon oath being hereby expressly waived), and that they may come to a fair and just account touching the amount due your orators upon the bond and mortgage aforesaid.

And that the defendants, Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, be decreed forthwith to pay to your orators the amount which shall be found to be due to your orators thereon, together with your orators' cost and charges in this behalf sustained.

And in default thereof, that the defendants herein named, and each of them, and all persons claiming or to claim from or under them may be foreclosed and barred of and from all equity of redemption, and claim of, in, and to said mortgaged premises, and every part and parcel thereof, with the appurtenances.

And that all and singular the said mortgaged premises, with the appurtenances, or so much thereof as may be necessary to satisfy to your orators the full amount of the moneys secured so as aforesaid by said bond and mortgage, together with your orators' reasonable costs and charges, may be sold by the order and decree, and under the direction of this court, in the following order, to wit:

First: That portion of the said mortgage premises, the title
74 of which now stands in Frederick S. Ayres, Ebenezer Wiswall, and Ebenezer R. Ayres, and of which lands Frederick S. Ayers holds a contract of sale of the interest of Ebenezer Wiswall and James S. Ayres holds a contract of sale of a part of the interest of Frederick S. Ayres, and the money arising from the sale thereof, so far as shall be necessay, or so far as the same shall extend, be applied to satisfy the amount so due to your orators as aforesaid, both prin-

ciple and interest, and their reasonable costs and charges; and if this be not sufficient to satisfy the amount due as aforesaid, then,

Secondly. The lands described in said mortgage, and in which Frederick S. Ayres and James S. Ayres have conveyed their interest to Charles G. Learned, the moneys arising from the sale thereof be applied to satisfy the amount so due as aforesaid; and if this be still insufficient to satisfy the amount due, then,

Thirdly. The lands described in said mortgage that have been conveyed or contracted as aforesaid, in the inverse order of alienation, and the amount arising therefrom, be applied to satisfy the amount due as aforesaid, and your orators' reasonable costs and charges as aforesaid.

And that the said defendants, and all persons claiming or to claim under them, or either of them, or who have come into possession of the said mortgage premises, or any part or portion thereof, during the pendency of this suit, deliver and yield up possession thereof to your orators, or to whomsoever shall become the purchaser or purchasers thereof at the said sale, on his, her, or them producing to him or them, or to the person or persons in possession of said mortgaged premisis, or any part thereof, the deed or deeds executed by the circuit court commissioner of this court, pursuant to such sale as aforesaid, and a certified copy of the order confirming the report of such sale, after such order has become absolute.

And that the said Frederick S. Ayres, Charles G. Learned, Ebenezer Wiswall, and James S. Ayres pay to your orators any balance that shall remain due to your orators of the principal and interest of said bond and indenture of mortgage, if the sale of said mortgaged premises, as aforesaid, fail to produce sufficient to pay the whole of said mortgage debt, and the costs of this suit; and that in such case your orators have execution for the collection of such balance and the costs thereon, according to the rules and practice of this court.

75 And that your orators may have such other relief, or such further relief in the premises as shall be agreeable to equity and good conscience, may it please the court, the premises being considered, to grant to your orators the writ of subpœna to be issued out and under the seal of this court, to be directed to the said Frederick S. Ayres, Ebenezer Wiswall, Charles G. Learned, James S. Ayres, Ebenezur R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, the First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, defendants herein, and thereby commanding them and each of them, on a certain day, and under a certain penalty, to be therein inserted, personally to be and appear before this court, then and there to answer all and singular the premises, and to stand to, and abide and perform such

order and decree therein annexed [as] this court shall make therein, and as shall be agreeable to equity and good conscience.

And your orators will ever pray, etc.

CHARLES E. WISWALL.
WILLIAM McALPINE WISWALL.
EBENEZER S. WISWALL.
TUISCO G. WISWALL.
ANN E. BAERMAN.
By RICHARD WINSOR, *Their Solicitor.*

RICHARD WINSOR,
Solicitor for Complainants.

I endorse as security for costs.

JONAS R. LEARNED.

Endorsed: In the circuit court for the county of Huron. In Chancery. Charles E. Wiswell *et al. vs.* Frederick S. Ayres *et al.* Complainants' bill. Filed April 15th, 1879. John M. Cary, dep. register. Richard Winsor, solicitor for complainants.

76 STATE OF MICHIGAN.

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

HURON COUNTY, *ss:*

I, John M. Cary, deputy clerk of said county and deputy register of the circuit court for the county of Huron, in chancery, do hereby certify that the above and foregoing is a true and compared copy of the original bill of complaint, answer, and replications and of all other papers filed in the above-entitled cause, and of the rules and orders entered therein, and of the whole of said cause remaining of record in my office, except complainants' proofs and defendants' proofs taken before Commissioner James H. Randall, of Detroit, Michigan, and the testimony of winesses taken before Geo. C. Green, circuit court commissioner for the county of Huron.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court, this 18th day of March, 1880.

[SEAL.] JOHN M. CARY,
Deputy Register.

Endorsd: No. 2626. U. S. circuit court, east. dist. Mich. In equity. Charles E. Wiswall *et al. vs.* Fred. S. Ayres *et al.* Record. Filed as of March 2nd, 1880, by leave of court granted on this 22nd day of March, 1880. Jno. Graves, d'p cl'k. James H. Hall, compl'ts' sol'r. Atkinson & Atkinson, of counsel.

77 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room, in the city of Detroit, on Wednesday, the seventh day of April, in the year one thousand eight hundred and eighty.

Present: The Honorable Henry B. Brown, district judge.

Case removed from the circuit court for the county of Huron, in the State of Michigan.

CHARLES A. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

On reading and filing the bill, process, pleadings, and other proceedings, in the circuit court for the county of Huron, in this district, as duly certified from said court, and filed in this court, and on motion of Atkinson & Atkinson, of counsel for the petitioners, for the removal of said cause into this court, it is ordered by the court now here that the said cause be and the same is hereby entered in this court in due form, as of the first day of the present term of this court, and that the testimony in this cause be taken within ninety days from this day.

78 & 79 United States Circuit Court for the Eastern District of Michigan.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

versus

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John

Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

80 *Complainants' Bill.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

To the Circuit Court for the County of Huron. In Chancery.

Your orators, Charles E. Wiswall, William McAlpine Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, all of the State of New York, respectfully show unto the court, that on or about the 27th day of January, in the year of our Lord one thousand eight hundred and sixty-nine, Frederick S. Ayres, Ebenezer Wiswall, and Charles G. Learned, being indebted to Catherine A. Wiswall, of West Troy, New York, in the sum of forty thousand one hundred and five and 43-100 dollars, did make and execute under their hands and seals—James S. Ayres joining therein as surety—and deliver to the said Catherine A. Wiswall, a certain bond, which was in words and figures substantially as follows, to wit:

"Know all men by these presents, that we, Frederick S. Ayres and Charles G. Learned, of Port Austin, Michigan, and Ebenezer Wiswall, of West Troy, New York, are held and firmly bound unto Catherine E. Wiswall, of West Troy, New York, in the sum of eighty thousand dollars, good and lawful money of the United States, to be paid to the said Catherine Wiswall, her executors, administrators, and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with our seals, dated the 27th day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

"The condition of this obligation is such, that if the above bounden Frederick S. Ayres, Charles G. Learned, and Ebenezer Wis-
81 wall, their heirs, executors, and administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above named Catherine A. Wiswall, her executors, administrators, and assigns, the just and full sum of money that may be legally due on a certain mortgage dated January twenty-seventh, one thousand eight hundred and sixty-nine, and executed by Frederick S. Ayres, Eben. Wiswall, Nancy Ayres, Charles G. Learned, and Maria Learned, unto Catherine A. Wiswall, and recorded in the clerk's office of Huron county, Michigan, March 11, 1869, at 11 o'clock a. m., then this obligation to be void and of no effect, or else to remain in full force and virtue.

"In witness whereof, we have hereunto affixed our hands and seals the day and year first above written.

"EBENEZER WISWALL. [SEAL.]
"F. S. AYRES. [SEAL.]
"CHAS. G. LEARNED. [SEAL.]
"(As security), J. S. AYRES. [SEAL.]

"Witnessed by—
"J. S. AYRES.
"C. E. WISWALL."

And your orators further show unto the court that the said Frederick S. Ayres and Nancy Ayres, his wife, and the said Charles G. Learned and Maria Learned, his wife, and the said Ebenezer Wiswall, on the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and sixty-nine, in order to secure to said Catherine Wiswall the payment of the sum of forty thousand one hundred and five and 43-100 dollars, evidenced by their bond of even date therewith, payable two years from date, with interest thereon at the rate of seven per cent. per annum, payable semi-annually, did execute, under their hands and seals, and did afterwards acknowledge and deliver to the said Catherine A. Wiswall, a certain indenture of mortgage, bearing date the day and year last aforesaid, and thereby, for the consideration of forty thousand one hundred and five and 43-100 dollars to the said Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, in hand paid by the said Catherine A. Wiswall, the said Frederick S. Ayres and Nancy, his wife, and the said Charles G. Learned and Maria Learned, his wife, and the said Ebenezer Wiswall, the parties of the first part in and to said indenture of mortgage, did grant, bargain, sell, and convey unto the said Catherine A. Wiswall, the party of the second part in the said indenturn, and to her heirs and assigns forever, the following described premises, situate in the county of
82 Huron, in the State of Michigan, and known as the Port Austin mill property, to wit:

Description.	*Section.*	*Town N.*	*Range E.*
The s part of s e fractional q	22	19	13
The s w q of n e q, s e q of n w q, and e h of s w q	26	19	13
The w h of n e q, n w q, & n w q of s w q	27	19	13
The s h of n w q, and w h of s w q	28	19	13
The n w q of n e q, s e q of n e q, and e part of n w q	29	19	13
The w h of s w q and s e q	29	19	13
The n e q of s e q	30	19	13
The e h of n e q and s e q	31	19	13
The n e q, e h of n w q, & e h of s w q	32	19	13
The w h of s e q, and s e q of s e q	32	19	13
The s e q of n w q, and s e q	33	19	13
The s h of s w q	34	19	13
The s e q of s e q	36	19	13

Description.	*Section.*	*Town. N.*	*Range E.*
The e part of n e q, and n e q of s e q	1	18	13
The n part of n e q, & n e fl q of n w fl q	3	18	13
The w fl h of n w fl q, and w h of s w q	3	18	13
The s e q of s w q and s w q of s e q	3	18	13
The n e q of n h of n w q, and s e q	4	18	13
The e h of n e q, and n w q of n e q	5	18	13
The e h of s e q	5	18	13
The n e q, n e q of n w q, and s w q of s w q	6	18	13
The e h of s w q, and w h of s e q	6	18	13
The w h of n e q, and e h of n w q	7	18	13
The n w q of n w q, s w q, & w h of s e q	7	18	13
The e h of n e q	8	18	13
All of	9	18	13
The n w q, n w q of s w q, and s h of s w q	10	18	13
The w h of s w q	13	18	13
The e h of s e q	14	18	13
The n w q, s w q of s w q, & n e q of s w q	15	18	13
The s e q of s e q	17	18	13
The n w of n e q, n w fl q, and n fl part of s w fl q	18	18	13
The n e q of n e q, and s e q of s e q	20	18	13
The n w q of n w q	23	18	13
The n w q of n w q	28	18	13
The n e q of n e q	29	18	13
83 The e h of s e q	36	18	13
The w fl part of n w fl q	6	18	14
The n h of n e q, and s w q of n e q	19	18	14
The s e q of n w q, and s w fl q	19	18	14
The n e q of n w q	30	18	14
The e part of n e fl q	1	17	13
The n e q of n e q	12	17	13
The w fl part of s w fl q	6	17	14
The n part of n w fl q	7	17	14
The n h of n e q, and h of n w q	17	17	14
The s w q of s w q	31	19	14
The w h of s e q	25	19	12
Lots Nos 2 and 3	25	19	12
The n w q of n w q	36	19	12
The e h of s w q	1	18	12
The n w q of n e q	12	18	12
The n e q of n e q	13	18	12
The s h of s e q	25	18	12
The n h of n e q	36	18	12

Said indenture of mortgage was upon the express condition that the same shall be null and void if the said Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall should and did well and truly pay, or cause to be paid, the sum of forty thousand one hundred and five and $\frac{43}{100}$ dollars in two years from the date thereof, with interest at the rate of seven per cent. per annum, payable

semi-annually to said Catharine A. Wiswall, her executors, administrators, or assigns, according to the terms and conditions of said bond and mortgage, which bond and mortgage were subsequently lost by said Catharine A. Wiswall, and are supposed to have been stolen.

Your orators further show that said indenture of mortgage was given to secure the purchase price of the lands mortgaged, the mortgagors being permitted to purchase the land at mortgage sale, and that they afterwards gave this mortgage to secure the purchase price agreed upon.

The execution of said mortgage was on the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and sixty-nine, duly acknowledged by the said Frederick S. Ayres, Nancy Ayres, his wife, and Ebenezer Wiswall, on the same
84 day, before George O. Selkirk, clerk of the court of common pleas of Erie county, Ohio, duly authorized to take such acknowledgment, the certificate of such acknowledgment being duly indorsed on said mortgage, and duly acknowledged by the said Charles G. Learned and Maria Learned, his wife, on the eleventh day of March following, before Edmond Cole, a notary public, duly authorized to take such acknowledgment, the certificate of such acknowledgment being duly endorsed on said mortgage.

And your orators further show unto the court, that afterwards, to wit, on the eleventh day of March, A. D. 1869, the said indenture of mortgage was in due form of law recorded in the office of the register of deeds, in the county of Huron and State of Michigan, in liber C of mortgages, on page 240. That afterwards, to wit, on the 25th day of February, A. D. 1874, the said Catharine A. Wiswall assigned the said mortgage and bond to your orators, by an instrument in writing, which instrument was in words and figures substantially as follows, to wit:

"Know all men by these presents, that I, Catharine A. Wiswall, of the village of West Troy, Albany county, N. Y., of the first part, in consideration of the sum of one dollar to me in hand paid by Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, of the second part, at or before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, resigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said parties of the second part a certain indenture of mortgage, bearing date the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and sixty-nine, made by Frederick S. Ayres, Nancy Ayres, his wife, Charles G. Learned, and Maria Learned, his wife, and Ebenezer Wiswall, and which said mortgage was recorded in the register's office of Huron county, Michigan, on the eleventh day of March, in the year 1869, in book of mortgages No. C, at page 240, &c., together with the bond or obligation herein described, and the money due and to grow due thereon, with the interest, to have and to hold the same unto the said parties of the second part for their use and benefit, subject only to the provisions in the said indenture of mortgage mentioned; and I do hereby make, consti-

tute, and appoint the said parties of the second part my true and lawful attorneys, irrevocable in my name or otherwise, but at
85 their own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the said money and interest, and in case of payment to discharge the same as freely as I might or could do if these presents were not made. And I do hereby covenant to and with the said parties of the second part, that there is now due and owing upon said bond and mortgage the sum of —— dollars and cents, with interest from the —— day of ——, 18—, and that I have a good right to sell and assign the same as aforesaid.

"In witness whereof I have hereunto set my hand and seal this twenty-fifth day of February, in the year one thousand eight hundred and seventy-four.

CATHARINE A. WISWALL.

Signed and delivered in the presence of—
GEORGE S. LEARNED.
GEORGE L. POLLOCK.

STATE OF NEW YORK, } ss:
Rensellaer County, }

On the twenty-fifth day of February, one thousand eight hundred and seventy-four, before me, a commissioner for the State of Michigan, appeared Catharine A. Wiswall, to me well known to be the person described in and who executed the within assignment, and acknowledged that she executed the same.

A. G. HALSTEAD, [SEAL.]
Commissioner of the State of Michigan, Troy, N. Y.

Your orators further show that afterwards, to wit, on the second day of June, A. D. 1874, the said assignment was duly recorded in the register's office of said county of Huron, in liber C of mortgages, on pages 253 and 254.

Your orators further show, that on the 31st day of October, A. D. 1871, the said Ebenezer Wiswall contracted to sell all his right, title, and interest in and to the real and personal property, rights, and credits of the firm of Ayres, Learned & Wiswall (which property of the firm of Ayres, Learned & Wiswall included the lands covered by said mortgage) to the said Frederick S. Ayres, subject to the payment of the mortgage aforesaid and interest, which contract was in words and figures substantially as follows, to wit:

"This contract, made this 31st day of October, A. D. 1871, be-
86 tween Ebenezer Wiswall, of West Troy, Albany county, New York, of the first part, and Frederick S. Ayres, of Port Austin, in the State of Michigan, of the second part: Whereas, the parties hereto and Charles G. Learned, of Port Austin, in the State of Michigan, have been for a number of years, and are now, partners in trade, under the name of Ayres, Learned & Wiswall, of Port Austin aforesaid, and as such own a large amount and quantity of real and personal estate in the State of Michigan, and per-

sonal property in the State of Ohio, and notes, bonds, and mortgages and accounts against sundry persons and firms:

And whereas, on the books of said firm is an account against said party of the first part for $14,081.30, and an account against Charles E. Wiswall, which is included in said amount, and against which is an offset of $348.47, leaving $13,732.83 balance:

And whereas, the said Ebenezer Wiswall has agreed to sell, and he doth hereby sell, to the said Federick S. Ayers, the party of the second part hereto, all his the said party of the first part's interest in and to all the said real and personal estate, rights, and credits in which he has any interest as one of the partners of said firm, be the same more or less, upon the terms and conditions following, that is to say: for the sum of $31,449.96, payable as follows: cash this day $7,500.00; the sum of $7,500.00 and interest thereon at 7 per cent on the first day of December next; the sum of $6,238.93, with the interest thereon at seven per cent., nine months from this date; the sum of five thousand one hundered and five dollars and fifty-one cents and interest, twelve months from this day; and the like sum with interest eighteen months from this day. And the said party of the second part assumes and is to arrange and settle the said sum of $13,732.83, the balance of said accounts against the party of the first part and Charles E. Wiswall; and the said party of the second part also agrees to pay, satisfy, and discharge and save harmless the party of the first part from all the debts and liabilities of said firm, for which the said party of the first part is or shall be liable as such partner in any way, and for such payment and indemnity the party of the second part has made, executed, and delivered to party of first part his bond of this date.

And for the payment of the $7,500 and interest payable on the first of December next, and the sum of $5,105.51 at twelve and eighteen months with interest, he has given his promissory notes to party of the first part; and for the payment of the $6,238.93 without interest, and which note is also endorsed by Messrs.
87 Moore, Foote & Co., and has made and delivered to party of the first part his note for $327.55, at nine months, being the interest on $6,238.93 for nine months.

And the said party of the first part hereby agrees, that upon the payment of said sum of $31,449.96, and as aforesaid, and upon the settlement and discharge of said sum of $13,732.83, he will make, execute, acknowledge and deliver—his wife joining therein—a good and sufficient deed, conveying to the party of the second part, his heirs and assigns, all his interest in the said real estate. Such deed, however, shall be subject to all liens and encumbrances thereon and convenants only against the acts of the party of the first part for his personal benefit.

And in case of the failure of the party of the second part to pay said purchase price, or any part thereof, at the time and times above mentioned, and in case such default shall continue for the space of three months, then after the expiration of said three months the party of the first part may take possession of said property, and shall be reinstated therein as of his own property, and any payment

which shall have been made shall be declared forfeited as damages for non-performance on the part of second party; or the said party of the first part may proceed and collect the balance of said purchase money either by suit on said notes or by foreclosure of this contract for such unpaid purchase money. It being also understood, that the above sale is made also subject to a mortgage given by the parties hereto and said Charles G. Learned to the wife of the party of the first part, for $40,105.03 and interest, which is to be paid by the said party of second part and said Learned; and as between the parties horeto, the same is allowed and taken as part of the purchase price of said premises.

EBENEZER WISWALL. [SEAL.]
F. S. AYRES. [SEAL.]

In presence of—
J. W. MASON,
D. C. HOLBROOK.

STATE OF MICHIGAN, *County of Huron:*

On this 31st day of October, 1871, personally appeared before me the above named Ebenezer Wiswall and Frederick S. Ayres, and they severally acknowledged that they executed the same as their free act and deed.

B. T. PRENTIS,
Notary Public for Wayne County.

88 And your orators further show, that at the same time the said Frederick S. Ayers gave his written obligation to perform said contract as entered into with said Ebenezer Wiswall, which bond was in words and figures substantially as follows, to wit:

Know all men by these presents, That I, Frederick S. Ayres, of Port Austin, Michigan, am held and firmly bound unto Ebenezer Wiswall, of West Troy, New York, in the sum of forty thousand dollars, lawful money of the United States of America, to be paid to the said Ebenezer Wiswall, or to his certain attorneys, heirs, executors, administrators, or assigns, to which payment well and truly to be made I bind my heirs, executors, and administrators, and each and every of them, firmly by these presents.

Sealed with my seal, dated the 31st day of October, one thousand eight hundred and seventy-one.

The condition of this obligation is such, that, whereas the said parties hereto, and Charles G. Learned, have been and are partners under the name and style of Ayres, Learned & Wiswall, of Port Austin, Michigan; and whereas, the said Wiswall has agreed in writing to sell said Ayres all his the said Wiswall's interest in said firm, and all the property thereof, real and personal, and said Ayres assumes and agrees to pay, save harmless, and indemnify said Wiswall from all the debts and liabilities of said firm, and for all matters connected therewith, and from all costs, charges, trouble, and expenses he may be put to by reason thereof.

Now, therefore, if the said Frederick S. Ayres shall well and truly

pay, and save harmless and indemnify said Ebenezer Wiswall, his heirs, executors, and administrators, from all such debts and liabilities from all costs, charges, trouble, and expenses he may be put to by reason of such debts, then this obligation shall be void; otherwise of full effect and virtue.

F. S. AYRES. [SEAL.]

Your orators further show unto the court, that afterwards, to wit, on the 20th day of October, A. D. 1874, the said Charles G. Learned, and one Jonas R. Learned, who was interested with him in certain personal property, contracted to sell and did sell to Ebenezer R. Ayres, of Sandusky, Ohio, all their interest in and to the real and personal estate, rights and credits of the firm
89 of Ayres, Learned & Co., said real property being a one-fourth interest in the property described in said mortgage, together with numerous other descriptions of land; which contract was in words and figures substantially as follows:

This contract, made this 20th day of October, A. D. 1874, between Jonas R. Learned and Charles G. Learned, of Port Austin, Michigan, of the first part, and Ebenezer R. Ayres, of Sandusky, Ohio, of the second part. Whereas, Jonas R. Learned and Charles G. Learned are now owners of a quarter interest of the real and personal property belonging to the firm of Ayres, Learned & Co., doing business at Port Austin, Michigan; and whereas the said Jonas R. Learned and Charles G. Learned have agreed to sell, and do hereby sell, to the said Ebenezer R. Ayres, the party of the second part hereto, all their the said party of the first part's interest in and to all the said real and personal estate, rights, and credits, in which they have any interest as owners of said one quarter of the real and personal property of the firm of Ayres, Learned & Co., be the same more or less, except in ($30,000) thirty thousand dollars worth herein, taken as part payment, upon the terms and conditions following, that is to say, for the sum of (40,000) forty thousand dollars, payable as follows: Certain real and personal property in Port Austin, taken at a cash valuation of ($30,000) thirty thousand dollars, and the notes of said E. R. Ayres (indorsed by F. S. Ayres and J. S. Ayres, or in their firm name, which may be adopted by them and E. R. Ayres in the conduct of their business at Port Austin, M.,) for five thousand dollars each, dated October 20, 1874, with interest at seven per cent., payable annually, in five and six years after date, at Port Austin, Michigan. Upon the settlement and payment of the said sum of forty thousand dollars, in the manner hereinbefore stated, they, the said party of the first part, will make, execute, and acknowledge and deliver, their wives joining therein, a good and sufficient deed conveying to the party of the second part, and his heirs and assigns, all their interest in the said real estate. Such deed, however, shall be subject to a mortgage given by Eben. Wiswall, Frederick S. Ayres, and Charles G. Learned to the wife of said Eben. Wiswall for $40,105.03, and interest, which is to be paid by the said party of the second part and said F. S. Ayres and J. S. Ayres; and as between the said parties hereto, the

same is allowed and taken as part of the purchase price of said premises. Said E. R. Ayres agrees to pay the proportion of
90 said J. R. Learned and C. G. Learned's indebtedness of Ayres, Learned & Co., as may appear by the books of said Ayres, Learned & Co.

CHAS. G. LEARNED. [SEAL.]
JONAS R. LEARNED. [SEAL.]
EBENEZER R. AYRES. [SEAL.]

In presence of—
R. WINSOR.
J. S. AYRES.

STATE OF MICHIGAN, *County of Huron*, } *ss:*

On this 20th day of October, 1874, personally appeared before me the above-named Jonas R. Learned, Charles G. Learned, and Ebenezer R. Ayres, and they severally acknowledged that they executed the same as their free act and deed.

RICHARD WINSOR,
Notary Public.

Your orators further show that afterwards, to wit, on the 20th day of October, 1874, in pursuance of the contract last before mentioned, the said Charles G. Learned and Maria Learned, his wife, did convey by deed, under their hands and seals, subject to the payment of a certain mortgage made January 27, 1869, by Frederick S. Ayres, Nancy Ayres, Charles G. Learned, Maria Learned, and Eben. Wiswall, to Catherine A. Wiswall, together with numerous other lands, all their right, title, and interest in and to all the lands described in said mortgage, except the following descriptions, to wit:

Description.	*Section.*	*Town N.*	*Range E.*
The s e q of s e q and n w q of n e q-----	12	18	12
The s h of s e q----------	25	18	12
The n h of n e q----------	36	18	12
The w h of s e q----------	25	19	12
The n w q of n w q----------	36	19	12
The e h of n w q----------	27	19	13
The n w q of n e q, s e q of n e q, and e h of s e q----------	29	19	13
The n e q of s e q, & s h of n e q of n e q--	31	19	13
The s e q of n w q----------	33	19	13
The s e q of s w q----------	34	19	13

All in Huron county, Michigan, and except lands before then sold to sundry persons, herein also set forth.

91 That the execution of said deed was, on the 20th day of October, A. D. 1874, duly acknowledged by the said Charles G. Learned and Maria Learned before J. R. Learned, a notary public, duly authorized to take such acknowledgment, on the 23d day

of August, 1875, the certificate of such acknowledgment being duly endorsed on said mortgage, and that said deed was afterwards duly recorded in the office of the register of deeds of said Huron county, in liber F of deeds, on pages 36, 37, and 38.

Your orators further show that afterwards, to wit, on the fifth day of August, A. D. 1875, the said Frederick S. Ayres and James S. Ayres, in pursuance of the contract last above mentioned, and as part payment of the purchase price therein mentioned, conveyed by warranty deed, their wives joining therein, together with numerous other lands, the lands last above particularly described to the said Charles G. Learned; which deed was duly acknowledged on the 7th day of September, 1875, before Jonas R. Learned, a notary public, duly authorized to take such acknowledgment, and duly recorded in the register's office of Huron county, in liber F of deeds, on pages 38 and 39, as in and by said deed now in possession of your orators and ready to be produced and proved as this court may direct, will more fully and at large appear, and to which, when so produced and proved, your orators, for greater certainty, pray leave to refer.

And your orators further show unto the court that they have been paid upon said bond and mortgage the following sums of money, at the dates mentioned, to wit:

Feb'y 27, 1872	$8,000 00
April 3, 1876	1,497 00
October 2, 1876	1,197 00
October 29, 1877	999 00
Novem'r 25, 1878	1,289 29
June 14, 1873	10,000 00
May 1, 1876	1,499 00
November 3, 1876	1,197 00
Decem'r 14, 1877	5,000 00

Your orators further show that there is now due and unpaid on said bond and mortgage the sum of forty thousand dollars, or thereabouts.

And your orators further show that no proceedings at law have been had to recover the debt secured by the said bond and mortgage, or any part thereof.

And your orators further show that they have caused examination to be made of the record of deeds and mortgages in the office of the register of deeds of the county of Huron and State of Michigan, where said mortgaged premises are situated,
92 from which it appears, and your orators expressly charge the fact so to be, that James S. Ayres, Ebenezer R. Ayres, Peter Smeeder, Jr., John Wallace, Jr., James Hall, Albert Botowitz, John Copeland, Frederick Empkie, Julius Empkie, Peter Wrobliski, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Samuel Parks, The Township of Port Austin, Huron county, Michigan, George Brown, John Babindererde, Charles Empkie, Jacob Helfferich, James Brebner, Isabella Skene,

George H. Gregory, Peter Patterson, Mark Carrington, Otis B. Williams, James Kerr, Mitchell Legassa, The First Presbyterian Church of Port Austin, Michigan, Leander Maybie, John Deschamps, have rights and interests in some of the premises in said mortgage, as subsequent purchasers or incumbrancers or otherwise.

And your orators further show that from examination of the record of deeds in said register's office a part of said mortgaged lands appear to have been transferred since the making of said mortgage; the descriptions, present owners thereof, and date of transfer, appearing by the following schedule:

The w h of n e q of n e q, section 6, T 18 N, R 13 E. Peter Smeeder, Jr. June 20, 1878.

The n e q of s e q, section 1, T 18 N, R 13 E. John Wallace, Jr. September 7, 1877.

The w h of n e q, section 27, T 19 N, R 13 E. James Hall. December 27, 1876.

Lot n side of Spring street, in the village of Port Austin. John Deschamps. December 20, 1876.

The s e q of s e q, section 5, T 18 N, R 13 E. Albert Botowitz. June 8, 1875.

The s w q of n e q and s e q of s w q, section 26, T 19 N, R 13 E. John Copeland. May 8, 1875.

Lot in w h of s w q, near Catholic Church, in Port Austin, section 29, T 19 N, R 13 E. Leander Maybie. March 7, 1875.

The e h of s w q, section 1, T 18 N, R 12 E. Julius Empkie and Frederick Empkie. January 25, 1875.

Lot on south side of State street, in the village of Port Austin, section 30, T 19 N, R 13 E. The First Presbyterian Church of Port Austin, Michigan. June 1, 1874.

Lots 10 and 12, on north side of Spring street, in the village of Port Austin, section 29, T 19 N, R 13 E. Mitchell Legassa. May 14, 1874.

The s w q of s e q, section 32, T 19 N, R 13 E. Peter Wrobliski. March 9, 1874.

93 Lot on corner of Lake and Spring streets, in village of Port Austin, Michigan, being 100 feet on Spring street and 50 feet on Lake street, being part of Winsor House property, section 30, T 19 N, R 13 E. Otis B. Williams and James Kerr. February 10, 1874.

Lot on northwest corner Lake and State streets, being 50 feet on Lake and 100 feet on State, now occupied by T. Winsor & Co., section 30, T 19 N, R 13 E. Mark Carrington. February 9, 1874.

The n w q of n e q, section 4, T 18 N, R 13 E. August Schwarnitz. December 25, 1873.

The n w q of s w q, section 27, T 19 N, R 13 E. Nicholas Kramer. December 22, 1873.

Lot on Line street, in the village of Port Austin, and now occupied by O. C. Comstock, section 30, T 19 N, R 13 E, Nicholas Kramer. December 22, 1873.

The s w q of s w q, section 9, T 18 N, R 13 E. Rufus Edmonds. December 12, 1873.

Lot on s w corner of Line and Spring street, in the village of Port Austin, section 30, T 19 N, R 13 E. Nicholas Kramer. September 18, 1873.

The n e q of n e q, section 13, T 18 N, R 12 E. James Ahearn. July 18, 1873.

The n h of s w q, section 9, T 18 N, R 13 E. Samuel Parks. March 8, 1873.

Lots 6 and 8 in Port Austin village, east of Bird creek, section 29, T 19 N, R 13 E. Peter Patterson. January 4, 1873.

Six acres in n w q of s e q, section 29, T 19 N, R 13 E. George Brown. August 29, 1872.

Six acres in n w q of s e q, section 29, T 19 N, R 13 E. The Board of Health of Port Austin, Huron county, Michigan. August 29, 1872.

The n h of s w q, section 7, T 18 N, R 13 E. John Babindererde. May 14, 1872.

Thirteen acres of land west of road in s w q of s w q, section 6, T 18 N, R 13 E. Charles Empkie. April 29, 1872.

Lot on east side of Lake street, in the village of Port Austin, now occupied by Frank Klebba, section 30, T 19 N, R 13 E. George H. Gregory. April 1, 1872.

The n w q of n e q, section 18, T 18 N, R 13 E. Jacob Helfferich. March 16, 1872.

Lot on north side of Spring street, in the village of Port Austin, occupied by R. Smith, section 30, T 19 N, R 13 E. James Brebner. August 8, 1870.

94 All of lot on west side Lake street, in Port Austin, Michigan, occupied by George Skene, section 30, T. 19 N, R. 13 E. Isabella Skene. August 8, 1870.

And your orators further show unto the court that they are informed and believe, and so charge the facts to be, that Bennet Richards, Richard Winsor, and Horace G. Snover have rights and interest in some of the lands covered by said mortgage, as subsequent purchasers under contract from the mortgagees in said mortgage, or parties holding under or claiming through them, or some of them.

And your orators further show unto the court that the firm of Ayres & Co., consisting of the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, contracted to sell, and did sell, to Richard Winsor and Horace G. Snover, on November 1, 1877, a lot 50 feet wide, on Lake street, and 100 feet deep, adjoining the lot now owned by Otis B. Williams and James Kerr, in the village of Port Austin, Mich., said lot being now occupied by said Williams & Kerr; and a lot immediately north of what is known as the Masonic Association lot, now owned by Mark Carrington, being 24 feet on Lake street and 100 feet deep, and now occupied by said Richard Winsor and Horace G. Snover, on which said lots large amounts have been paid, and all that is due by the contract of sale of said lands.

And that, as your orators are informed and verily believe, the defendants, Frederick S. Ayres, Charles G. Learned, and Ebenezer

Wiswall, composing the firm of Ayres, Learned & Wiswall, contracted to sell, and did sell, to Bennett Richards, on April 1, 1869, the lot on the corner of Lake and Spring streets, now occupied by said Bennett Richards, and described in said contract as lot number 1, according to Ayres, Learned & Wiswall's plat of a part of the village of Port Austin, which contract, as your orators are informed and believe, has long since been paid in full.

Your orators further show that they are informed and believe, and so charge the facts to be, that the mortgagees in said mortgage, and James S. Ayres and Ebenezer R. Ayres, claiming under them, or some of them, have entered into written contracts to sell the following descriptions of land, being lands covered by said mortgae, to wit:

	Description.	*Section.*	*Town. N.*	*Range E.*
	The n e q of n e q, and n h of n w q ------	4	18	13
	The n w q of n e q, and n e q of n e q------	5	18	13
	The s e q of n e q, and n e q of s e q ------	5	18	13
	The s h of n e q, n e q of n e q------	6	18	13
95.	All of the n w q of n e q east of road_	6	18	13
	The w h of s e q----------	7	18	13
	The e h of n e q----------	8	18	13
	The n h of n w q, and s h of n w q---------	9	18	13
	The n h of n w q----------	18	18	13
	The e h of s w q----------	26	19	13
	The s w q of n w q----------	27	19	13
	The s e q of s w q, and s e q of s e q------	32	19	13
	The s e q of s e q, s w q of s e q and n w q of s e q----------	33	19	13
	The s w q of s w q, and s e q of s w q-----	34	19	13
	The s e q of s e q----------	36	18	13

Upon which contracts of sale from time to time they have received large payments, but your orators are not informed to whom said lands have been sold, or the sum of purchase-money respectively paid thereon; and ask that the defendants Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, specifically set forth in their answer, whether such lands were sold under contract or not, the date of sale, to whom sold, the sum sold for, and the amount paid upon each contract of sale, and when paid, and further specifically set forth, whether any other of said lands have been alienated, and, if so, the date when, to whom, and the character of the alienation thereof.

Your orators further show that the northeast quarter of southwest quarter of section 6, in town. 18 north, of range 13 east, embraced in said mortgage was sold by the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, and conveyed by warranty deed to Charles Ball, on October 2, 1878, for the sum of $800.00; and that on the 25th day of November, 1878, said sum of $800.00 was paid over to these complainants, being embraced in the payment of $1,289.29 of that date; whereupon these complainants exe-

cuted a release of said description of land from said mortgage; that said sum of $800.00 was the full value of said land at the time said release was executed.

Your orators further show that there is no such land as lots Nos. 2 and 3 in section 25, of town. 19 north, of range 12 east, described in the commissioner's deed referred to in said mortgage.

Your orators further show that at the time of the execution of said mortgage it was made to include or embrace a number of descriptions of land that did not belong to the mortgagors, and of which they have not since become the owners, the description of which lands, and the owners thereof, are as follows: 96

The s w q of n e q of section 18, T 18 N, of R 13 E, owned by Jacob Helfferich; the n h of s w q of section 30, T 19 N, of R 13 E, owned by John W. Kimball; the n e q of s e q of section 23, T 19 N, of R 13 E, owned by James Ryan; the n e q of s e q of section 34, T 19 N, of R 13 E, owned by Jacob Miller.

Your orators therefore ask the aid of this court in the premises, and that the above-named Frederick S. Ayres, Ebenezer Wiswall, Charles G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeeder, Jr., John Wallace, Jr., James Hall, Albert Botowitz, John Copeland, Frederick Empkie, Julius Empkie, Peter Wrobliski, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Samuel Parks, The Township of Port Austin, Huron county, Michigan, George Brown, John Babindererde, Charles Empkie, Jacob Helfferich, James Brebner, Isabella Skene, George H. Gregory, Peter Patterson, Mark Carrington, Otis B. Williams, James Kerr, Mitchell Legassa, The First Presbyterian Church of Port Austin, Michigan, Leander Maybie, John Deschamps, and Bennett Richards, the defendants in this suit, may appear and answer this your orators' bill, without oath (answer upon oath being hereby expressly waived), and that they may come to a fair and just account touching the amount due your orators upon the bond and mortgage aforesaid.

And that the defendants, Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, be decreed forthwith to pay to your orators the amount which shall be found to be due to your orators thereon, together with your orators' cost and charges in this behalf sustained.

And in default thereof, that the defendants herein named, and each of them, and all persons claiming or to claim from or under them may be foreclosed and barred of and from all equity of redemption, and claim of, in, and to said mortgaged premises, and every part and parcel thereof, with the appurtenances.

And that all and singular the said mortgaged premises, with the appurtenances, or so much thereof as may be necessary to satisfy to your orators the full amount of the moneys secured so as aforesaid by said bond and mortgage, together with your orators' reasonable costs and charges, may be sold by the order and decree, and under the direction of this court, in the following order, to wit:

First. That portion of the said mortgaged premises, the title

97 of which now stands in Frederick S. Ayres, Ebenezer Wiswall, and Ebenezer R. Ayres, and of which lands Frederick S. Ayres holds a contract of sale of the interest of Ebenezer Wiswall and James S. Ayres holds a contract of sale of a part of the interest of Frederick S. Ayres, and the money arising from the sale thereof, so far as shall be necessary, or so far as the same shall extend, be applied to satisfy the amount so due to your orators as aforesaid, both principal and interest, and their reasonable costs and charges; and if this be not sufficient to satisfy the amount due as aforesaid, then,

Secondly. The lands described in said mortgage, and in which Frederick S. Ayres and James S. Ayres have conveyed their interest to Charles G. Learned, the moneys arising from the sale thereof be applied to satisfy the amount so due as aforesaid; and if this be still insufficient to satisfy the amount due, then,

Thirdly. The lands described in said mortgage that have been conveyed or contracted as aforesaid, in the inverse order of alienation, and the amount arising therefrom, be applied to satisfy the amount due as aforesaid, and your orators' reasonable costs and charges as aforesaid.

And that the said defendants, and all persons claiming or to claim under them, or either of them, or who have come into possession of the said mortgaged premises, or any part or portion thereof, during the pendency of this suit, deliver and yield up possession thereof to your orators, or to whomsoever shall become the purchaser or purchasers thereof at the said sale, on his, her, or them producing to him or them, or to the person or persons in possession of said mortgaged premises, or any part thereof, the deed or deeds executed by the circuit court commissioner of this court, pursuant to such sale as aforesaid, and a certified copy of the order confirming the report of such sale, after such order has become absolute.

And that the said Frederick S. Ayres, Charles G. Learned, Ebenezer Wiswall, and James S. Ayres pay to your orators any balance that shall remain due to your orators of the principal and interest of said bond and indenture of mortgage, if the sale of said mortgaged premises, as aforesaid, fail to produce sufficient to pay the whole of said mortgage debt, and the costs of this suit; and that in such case your orators have execution for the collection of such balance and the costs thereon, according to the rules and practice of this court.

And that your orators may have such other relief, or such
98 further relief in the premises as shall be agreeable to equity and good conscience, may it please the court, the premises being considered, to grant to your orators the writ of subpœna to be issued out and under the seal of this court, to be directed to the said Frederick S. Ayres, Ebenezer Wiswall, Charles G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Frederick Empkie, Julius Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds,

James Ahearn, Samuel Parks, Peter Patterson, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, defendants herein, and thereby commanding them, and each of them, on a certain day, and under a certain penalty, to be therein inserted, personally to be and appear before this court, then and there to answer all and singular the premises, and to stand to, and abide and perform such order, and decree therein as this court shall make therein, and as shall be agreeable to equity and good conscience.

And your orators will ever pray, etc.

CHARLES E. WISWALL,
WILLIAM McALPINE WISWALL,
EBENEZER S. WISWALL,
TUISCO G. WISWALL,
ANN E. BAERMAN,
By RICHARD WINSOR, *Their Solicitor.*

RICHARD WINSOR,
Solicitor for Complainants.

99 *Answer of Frederick S. and Jas. S. Ayres.*

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McALPINE WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES *et al.*, Defendants.

The answer of Frederick S. Ayres and James S. Ayres to the complainants' bill.

The defendants, saving all objections and exceptions to the complainants' bill, answering, say:

First. They deny that on the twenty-seventh day of January, 1869, Frederick S. Ayres, Ebenezer Wiswall, and Charles G. Learned were indebted to Catherine S. Wiswall in the sum stated in said bill, or any other sum; and allege the fact to be, that the said Ayres, Learned, and Wiswall had then for some time constituted a firm by that name, and were indebted to the said Wiswall for moneys advanced on account of said firm, amounting at that time to twenty-one thousand dollars, which amount had been advanced by said Wiswall to pay a mortgage upon the land of said firm, held by one Calvin P. Austin.

That said Wiswall, not wishing to take security in his own name, caused a bond and mortgage to be executed by said firm to his wife, Catherine Wiswall, and, for some reason of his own, had the consideration named therein, as stated in said bill, instead of the sum actually due him.

That the said Ayres, having full confidence in said Wiswall, executed said bond and mortgage at his request, but with the
100 understanding that only the amount actually due should be paid.

That said Catharine Wiswall never paid anything for said bond and mortgage, but held the same during her lifetime and up to the time of her assignment thereof, for the said Ebenezer Wiswall.

They deny that said mortgage was given to secure the purchase price of the lands described therein.

They admit the acknowledgement and recording of said mortgage, as stated in said bill.

They neither admit nor deny the assignment of said mortgage by said Catharine Wiswall, as stated in said bill, and leave the complainants to prove the same as they shall be advised.

They admit said Ebenezer Wiswall afterwards agreed to sell his interest in said lands to said Frederick S. Ayres, but whether the contract is correctly set out in said bill they are unable to state, and leave the complainants to prove the same.

They neither admit nor deny the giving of the bond by Frederick S. Ayres to Ebenezer Wiswall, alleged in said bill, and leave the complainants to prove the same, as they shall be advised.

They admit the sale by said Charles G. Learned and Jonas R. Learned of their interest in said lands to Ebenezer R. Ayres, but whether their contract of sale is correctly set out in said bill they are unable to state, and leave the complainants to prove the same as they shall be advised.

They admit that the sums stated in said bill have been paid on said bond and mortgage, but they deny that those are the only payments made thereon, and insist that other and large sums of money have been paid on said bond and mortgage, and they deny that there is now due thereon the sum of forty thousand dollars or thereabouts, and claim that the amount due thereon does not exceed the sum of twenty thousand two hundred and eighty-eight dollars, including interest, and the costs of this suit to date.

These defendants, further answering, say that on the twelfth day of June, A. D. 1879, they tendered to Richard Winsor, Esq., the solicitor for said complainants, the sum last aforesaid, in legal tender notes of the United States, and requested the said Winsor to accept the same in payment of the amount due on said bond and mortgage, and the interest thereon, and the costs of this suit to date; but to receive the same the said Winsor absolutely refused.

101 And these defendants, further answering, claim that by reason of said tender and refusal the amount due upon said bond and mortgage has ceased to be a lien upon said lands.

And the defendant, Frederick S. Ayres, who is personally liable to pay the amount due on said bond and mortgage, answering, says that he is ready and willing to pay upon said bond and mortgage the sum actually due thereon; and for that purpose, on the refusal of the said complainants' solicitor to receive the sum tendered as aforesaid, these defendants placed said sum in the hands of Allan Shelden, Esq., of the city of Detroit, subject to the order of said complainants or their solicitor, and notified the said complainants' solicitor of that fact.

The defendants aver that said sum remains in the hands of said

Shelden, subject to said complainants' order as aforesaid, and that the same is all that is due upon said bond and mortgage for principal, interest, and costs.

And these defendants, further answering, say that said James S. Ayres is interested in the land described in said mortgage, under a contract between himself and Frederick S. Ayres, dated the twenty-third day of August, 1867, and is entitled under said contract to the undivided one-tenth thereof.

Without this that any other matter or thing by said bill contained, and not herein or hereby answered, is true.

These defendants say that the complainants have not in their said bill made or stated any case to entitle them to the relief prayed; and defendants ask the same benefit as if they had demurred thereto, and that they may be hence dismissed with their reasonable costs.

F. S. AYRES.
J. S. AYRES.

JAMES H. HALL,
Solicitor for Defendants.
ATKINSON & ATKINSON, *of Counsel.*

102 *Answer of Charles G. Learned.*

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM MCALPINE WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,
vs.
FREDERICK S. AYRES *et al.*, Defendants.

The answer of the defendant, Charles G. Learned, to the bill of complaint of the said complainants.

This defendant, saving to himself all manner of advantage of objection or exception to the many errors in the said bill of complaint contained; for answer thereunto, or unto so much thereof as this defendant is advised is material for him to make answer unto, answers and says:

That he admits that on the 27th day of January, 1869, Frederick S. Ayres, Ebenezer Wiswall, and this defendant were indebted to Catherine Wiswall in the sum stated in the said bill of complaint, and the giving the bond and mortgage therefor, and the execution and recording of said mortgage, as alleged therein.

This defendant further admits that on the 20th day of October, A. D. 1874, this defendant and one Jonas R. Learned, who was interested with this defendant in certain personal property, contracted to sell, and did sell, to Ebenezer R. Ayres, one of the above-named defendants, all their interest in the real and personal estate, etc., of Ayres, Learned & Co., said real property being a one-quarter interest in the lands described in said mortgage, together with numerous other lands, as alleged in said bill of complaint, but insists that said sale was made, subject to the payment of said mortgage
103 by said Ebenezer R. Ayres; that said mortgage, by the terms of said sale, was to be paid by the said Ebenezer R. Ayres

and the defendants, Frederick S. and James S. Ayres, and as between the said Ebenezer R. Ayres and this defendant and Jonas R. Learned, was taken and allowed as part of the purchase price of said premises so contracted and sold by this defendant and Jonas R. Learned to the said Ebenezer R. Ayres.

This defendant admits that afterwards, on the 20th day of October, 1874, in pursuance of the terms of said contract, this defendant and Maria Learned, his wife, did, by deed, under their hands and seals, convey to the said Ebenezer R. Ayres all their interest in the lands described in said mortgage, except in certain descriptions, as in said bill of complaint particularly set forth, which said conveyance was made expressly subject to the payment of said mortgage, as set forth in said bill of complaint.

And this defendant admits that afterwards, on the 5th day of August, 1875, the said Frederick S. Ayres and James S. Ayres conveyed, by warranty deed, in pursuance of the said contract between the defendant and Jonas R. Learned and Ebenezer R. Ayres, their wives joining therein, together with numerous other lands, that portion of the lands covered by said mortgage and not conveyed by the deed from Charles G. Learned and wife to Ebenezer R. Ayres, as heretofore stated, to this defendant.

And this defendant submits, that under the state of facts made out by the bill of complaint in this cause, the answer of the defendants, Frederick S. Ayres and James S. Ayres, and the contract and conveyance of October 20, 1874, as herein stated, that that portion of the lands described in said mortgage in which the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, or any or either of them, now have any interest, or in which they, or any or either of them, had any interest since October 20, 1874, the time of the making of the said contract between Charles G. Learned, Jonas R. Learned, and Ebenezer R. Ayres, should be first sold before any of said lands in which this defendant has now or has had since October 20th, 1874, any interest, and asks this court to so decree.

And this defendant further submits, that by the terms of said contract between this defendant and Jonas R. Learned and Ebenezer R. Ayres, aforesaid, and of the conveyance from Charles G. Learned and wife to Ebenezer R. Ayres, as aforesaid, the said Ebenezer R. Ayres is substituted for this defendant, so far as the payment of said mortgage is concerned, and asks this honorable court to decree
104 that, as between this defendant and the said defendant, Ebenezer R. Ayres, the said Ebenezer R. Ayres is first personally liable for the payment of any balance that may remain due to the said complainants of the principal and interest due on said bond and mortgage, if the sale of said mortgaged premises, as prayed for in said bill of complaint, fail to produce sufficient to pay the whole of said mortgaged debt and the costs of this suit, and that the said defendant, Ebenezer R. Ayres, be decreed to pay to this defendant his costs of this suit most wrongfully sustained.

CHARLES G. LEARNED,
By HORACE G. SNOVER, *His Solicitor.*

Answer of Ebenezer Wiswall.

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM MCALPINE WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES *et al.*, Defendants.

The answer of the defendant, Ebenezer Wiswall, to the bill of complaint heretofore filed in this cause.

This defendant, saving to himself all objections and exceptions to the many insufficiencies in the said bill of complaint contained, for answer thereunto, or unto so much thereof as this defendant is advised is material for him to make answer unto, answering, says:

That he admits that on the 27th day of January, 1869, Frederick S. Ayres, Charles G. Learned, and this defendant were in-
105 debted to Catharine A. Wiswall in the sum stated in said bill of complaint, and the giving of the bond and mortgage therefor, and the execution and recording of said mortgage, as therein alleged.

And this defendant further admits that on the 31st day of October, 1871, he contracted to sell all his right, title, and interest in and to the lands covered by said mortgage, together with other property, to the defendant Frederick S. Ayres, as alleged in said bill of complaint, but insists that said sale was made subject to the payment of said mortgage so made as aforesaid by Frederick S. Ayres, Charles G. Learned, and this defendant to Catharine A. Wiswall, which said mortgage, by the terms of said sale, was to be paid by said Frederick S. Ayres and Charles G. Learned, and as between this defendant and the said Frederick S. Ayres, was allowed and taken as part of the purchase price of said premises so contracted to be sold by this defendant to said Frederick S. Ayres.

And this defendant submits that on the state of facts set forth in the bill of complaint, the answer of Frederick S. Ayres and James S. Ayres, that that portion of the lands described in said mortgage, in which the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, or any or either of them, have any interest now, or in which they, or either of them, have had any interest since the 31st day of October, 1871, the date of the contract between this defendant and the said Frederick S. Ayres, either by deed, contract, or otherwise, should be first sold to satisfy the amount due upon said mortgage, and prays this honorable court to so decree.

And this defendant further submits, that by the terms of said contract of sale between this defendant and the defendant Frederick S. Ayres, that the said Frederick S. Ayres is substituted for this defendant so far as the payment of the said mortgage is concerned, and asks this honorable court to decree that, as between this defendant and the said defendant Frederick S. Ayres, that said Frederick S. Ayres is first personally liable for the payment of any balance that may remain due to the said complainants of the principal and

interest due on said bond and mortgage, if the sale of said mortgaged premises, as prayed for in said bill of complaint, fail to produce sufficient to pay the whole of said mortgaged debt and the costs of this suit, and that the said defendant Frederick S. Ayres be decreed to pay to this defendant his costs of this suit, most wrongfully sustained.

EBENEZER WISWALL,
By HORACE G. SNOVER, *His Solicitor.*

106 *Replication of Charles E. Wiswall et al.*

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM MCALPINE WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

EREDERICK S. AYRES *et al.*, Defendants.

The replication of Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Ayres, Tuisco G. Wiswall, and Ann E. Baerman, complainants, to the answer of Frederick S. Ayres and James S. Ayres, two of the above-named defendants.

These repliants, saving and reserving to themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be taken to the manifold insufficiencies of the said answer, for replication thereunto, say, that they will aver, maintain, and prove their bill of complaint to be true, certain and sufficient in the law, to be answered unto, and that the said answer is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatever in the said answer contained material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain and prove, as this honorable court shall direct, and pray as in and by this bill they have already prayed.

RICHARD WINSOR,
Solicitor for Complainants.

[A replication was filed as to the defendants Charles G. Learned and Ebenezer Wiswall, and the bill taken as confessed by the rest of the defendants.]

107 *The Testimony.*

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM MCALPINE WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES *et al.*, Defendants.

In pursuance of the several orders of the court, made in the above-

entitled cause, one of which was entered July 17th, A. D. 1879, one August 9th, A. D. 1879, and one August 12th, A. D. 1879, and in pursuance of the several stipulations heretofore made in this cause, two of which are dated August 19th, A. D. 1879, and one August 23d, A. D. 1879, by which several orders and stipulations it was referred to the circuit court commissioner for the county of Huron to take testimony in said cause.

I, the subscriber, the circuit court commissioner aforesaid, do hereby certify and report, that in pursuance of the orders and stipulations heretofore made in this cause, I proceeded, on the 3d day of September, A. D. 1879, at 9 o'clock in the forenoon of that day, at the office of Winsor & Snover, in Port Austin, Michigan, Richard Winsor appearing as solicitor for the complainants, and Atkinson & Atkinson for the defendants, Frederick S. Ayres and James S. Ayres, to take the testimony of the following witnesses on the part of the complainants, to wit: Frederick S. Ayres, James S. Ayres, and George H. Van Wort, continuing from day to day, as appears by the record of testimony hereto annexed, until their testimony was completed.

It is hereby understood and agreed that all testimony taken under this notice is to be taken subject to all objections and exceptions for incompency, irrelevancy, and immateriality; which exceptions made before the court will be treated the same as if already made here.

108 *Testimony of Frederick S. Ayres.*

FREDERICK S. AYRES, a witness produced, sworn, and examined on the part of the complainants:

I will be sixty-five next fall, and reside at Port Austin, Michigan. I am one of the defendants in this case.

Q. Had you anything to do with the purchase of a mortgage from Calvin P. Austin in behalf of Catherine A. Wiswall?

A. I never had any conversation with Catherine A. Wiswall in regard to a purchase of Calvin P. Austin mortgage, and I never made any purchase for her.

Q. Did you, at the request of Ebenezer Wiswall, one of the members of the late firm of Ayres, Learned & Wiswall, acting as agent for Catherine A. Wiswall, purchase a mortgage made on the 10th day of November, 1853, by Rollin C. Smith, Alfred A. Dwight, and William A. Howard, to Calvin P. Austin?

A. I did not.

Q. You knew of the existence of that mortgage?

A. Only by hearsay.

Q. At the time you purchased the property known as the Port Austin Mill property, had you heard of the existence of this mortgage?

A. Yes.

Q. Did you purchase subject to that mortgage?

A. I did, with the limitation as to the amount of the mortgage.

Q. Can you now state the amount of that limitation?

A. Could not tell the exact amount, but I could guess at it pretty

near. I think it was about twenty-one or twenty-two thousand dollars; being twenty or twenty-one years ago, and cannot tell exactly.

Q. Did the purchase of the Port Austin property take place about August 4th, 1859?

A. My impression was it was July. It might have been August.

The parol evidence of this date objected to.

Q. Was the sum of that mortgage that you bought the property subject to the payment of $22,769\frac{17}{100}$, or thereabouts?

Objected to, as incompetent, by Atkinson, because it does not appear that this witness alone bought any mortgage or property.

A. I cannot say.

Q. Did you, as agent acting for Catharine A. Wiswall, purchase that mortgage for her and have an assignment made to her?

A. I did not.

109 Q. Did you, acting in any other capacity, have an assignment of this mortgage made to Catherine A. Wiswall?

Objected to, as incompetent. This mortgage and said assignment are the proper evidence of this fact, if it be one.

A. I don't know whether there ever was any assignment or not. I never saw it.

Q. Did you not, on the 6th day of October, 1860, procure an assignment for Catharine A. Wiswall, of the mortgage you speak of as the Calvin P. Austin mortgage, and enter into contract on her behalf, to which you signed her name, in pursuance of which such assignment was placed in the hands of K. C. Barker, late of the city of Detroit?

Objected to, by Atkinson, because the question is double and misleading; as immaterial, because neither this contract or the assignment are mentioned in the pleadings, and because if there are such papers they should be produced.

A. I have no present recollections.

Q. Did you afterwards obtain from K. C. Barker an assignment of mortgage made by Calvin P. Austin to Catherine A. Wiswall?

A. I did not.

Q. Have you not that assignment of mortgage in your possession among your papers?

A. I have not to my knowledge.

Q. Will you make an examination among your papers and see if you have the original assignment from Calvin P. Austin to Catharine A. Wiswall, bearing date of September 1st, 1860?

A. I have no objections.

Q. Have you made examination for that assignment?

A. 1st, I never did. 2d, I have not.

Q. Have you made any search for the agreement between Calvin P. Austin and Catharine A. Wiswall, dated October 6th, 1860, referred to in the subpœna served upon you this morning?

A. I have not; I don't know what that mentioned in the subpœna refers to.

Q. Will you, in obedience to that subpœna, search for that agreement, and produce it here if it can be found?

Objected to, as improper to complainants own witness and as an effort on the part of the complainants to bolster up their case by having witness swear he will look for a paper which witness says he never had in his possession, and of the existence of which the witness has no knowledge.

A. I will search for it; I never had such a paper to the best of my knowledge.

110 Q. Do you know if the mortgage you refer to as the Calvin P. Austin mortgage was ever purchased from him for or in the name of Catharine A. Wiswall?

A. I purchased the mortgage. I payed the money for Ebenezer Wiswall and Ayres, Learned & Wiswall.

Q. Upon that purchase did you take any contract or assignment of the Calvin P. Austin mortgage to all or either of said parties; and, if so, how did you take it?

A. I don't think I ever took any contract or assignment at all.

Q. What did you take?

A. I took a receipt.

Q. Did Catharine A. Wiswall, or Ebenezer Wiswall in her name or otherwise, advance a large portion of the money with which you purchased the Calvin P. Austin mortgage?

A. She did not advance a dollar. Ebenezer Wiswall advanced $21,000.00.

Q. At what date did Ebenezer Wiswall advance the $21,000?

A. I cannot give the date, but as near as I can tell it was about the 6th of October, 1860. It was not an advance. Mr. Wiswall gave me $21,000, which he said he got for the sale of his interest in a ferry in West Troy, and I drew $6,000 from the bank of West Troy for Ayres, Learned & Wiswall; I went to Detroit, and immediately went to see D. C. Holbrook; told him I had the money to pay the Austin mortgage; he told me how much it came to—between twenty-five and twenty-six thousand dollars; I paid him the money; I told him I wanted the mortgage assigned to Catharine A. Wiswall, and took his receipt, and I think that was the last I had to do with him, excepting a few years afterwards Holbrook called upon me for a sum between eleven and twelve hundred dollars as a balance on the Austin mortgage, which I then paid for the company.

Q. Can you state, Mr. Ayres, in what shape you received the money from Ebenezer Wiswall?

A. I can.

Q. Please state.

A. I received from Mr. Wiswall, I think, two drafts of the bank of West Troy, in New York. I think one was $15,000.00, and one was six thousand.

Q. In what shape did you receive the money you drew from the bank of West Troy belonging to Ayres, Learned & Wiswall?

A. I received it in New York drafts. I paid twenty-one thousand dollars. Wiswall *east* gave me twenty-one thousand; I sold his drafts in Detroit at a premium, realizing about a
111 hundred dollars, which I handed to him, Mr. Wiswall.

Q. How soon after did you hand it to him?

A. I cannot tell. I handed it to him on my return to West Troy.

Q. What security, if any, was given to secure the payment of the sum of money handed you by Mr. Wiswall, or what arrangement was made, if any, by which its payment was secured?

A. I gave no security at all.

Q. Was any security given by any person in any manner, by which the payment of the money sent by Mr. Wiswall through you was secured?

A. There was no security given that I know anything about.

Q. Did Mr. Wiswall or Catharine A. Wiswall ever have any security for the payment of the same money given to you by Ebenezer Wiswall?

Objected to by defendants' counsel, unless complainants' counsel states what he means by security; whether by lien on real estate, or as also including personal security.

Counsel for the complainants states that he means security either by a lien on real estate or assignment of mortgage, or any other arrangement by which any mortgage or any other thing is to become or held as security for the payment of that sum of money.

A. I paid $21,000, and between four and five thousand of the company's money. I paid to D. C. Holbrook, and instructed Holbrook to assign the mortgage to Catharine A. Wiswall.

Q. Was that payment made for the purpose of purchasing or paying?

A. It was purchased for the purpose of having it foreclosed. I don't think that at the time of the purchase we had the foreclosure in view; that was an after consideration.

Q. Was there an understanding that the assignment Mr. Holbrook was directed by you to make, should pass to Catharine A. Wiswall an interest in the Calvin P. Austin mortgage equal to the sum of money given to you by Mr. Wiswall?

A. My understanding was, that the interest in the mortgage belonged to Mr. Ebenezer Wiswall all the way through.

Q. Down to what time?

A. To the assignment of the mortgage by the wife to the children.

Q. Was the Calvin P. Austin mortgage ever assigned?

A. I don't know of my own knowledge.

Q. What was your understanding about it being assigned?

112 Objected to, as incompetent. The assignment should be produced, and the witness should not be forced to make guesses that might be useful to the complainants if he was a bad guesser.

A. My understanding was, it was to be assigned to Catharine A. Wiswall.

Q. Did you inform Mr. Wiswall that it had been assigned to Catherine A. Wiswall?

A. I have no recollection of doing so.

Q. Did Mr. Wiswall, on or about the 28th day of August, 1860, hand you $22,000.00 in drafts of the Bank of West Troy on some bank of the city of New York, for the purpose of purchasing the Calvin P. Austin mortgage?

A. He did not.

Q. Did you not, on or about the 28th day of August, 1860, receive from Ebenezer Wiswall one draft on the Bank of West Troy for the sum of $18,000.00, three drafts for the sum of one thousand dollars each, and two drafts for the sum of five hundred dollars each on some bank of the city of New York which you afterwards sold in the city of Detroit, and used the proceeds in purchasing the Calvin P. Austin mortgage?

A. I did not.

Q. Did you know of Ebenezer Wiswall obtaining of the Bank of West Troy drafts for the purpose of purchasing the Calvin P. Austin mortgage, and were you with him at the bank when he obtained the drafts?

A. I don't recollect whether I was in the bank or not. I do recollect of his giving me a draft; I think $15,000.00, and one of $6,000.00.

Q. To whom were those drafts made payable?

A. I think they were made payable to me.

Q. At the time Mr. Wiswall gave you those drafs, did he give you any for any other purpose?

A. My memory is, he gave me but two drafts; he might possibly have given me the three drafts on Ayres, Learned & Wiswall account, but I think not.

Hereupon adjourned to September 4th, 9 a. m.

SEPTEMBER 4TH, 1879.

Examination of witnesses resumed, in the presence of George C. Green, commissioner, George H. Van Woert taking down the testimony by consent of the parties.

113 FREDERICK S. AYRES recalled by the complainants:

On my testimony yesterday I testified that Mr. Wiswall gave me two drafts to purchase the Calvin P. Austin mortgage, one of fifteen and one of six thousand, making twenty-one thousand dollars. I was in error in regard to the number of drafts. He gave me one of eighteen thousand and three of one thousand dollars each, making twenty-one thousand dollars.

Q. Did he also give you two drafts at the same time, issued by the same bank, for the sum of five hundred dollars each?

A. He did not of his own money, and I don't think he gave any

five hundred dollar drafts. If he did it was from the bank and was a part of the $6,000 for Ayres, Learned & Wiswall.

Q. Were the drafts that he gave you numbered consecutively?

A. I do not know. I never noticed any numbers on the drafts.

Q. Did Ebenezer Wiswall then have an account at the Bank of West Troy, N. Y.?

A. I do not know.

Q. Did Ayres, Learned & Wiswall then have an account at the Bank of West Troy, N. Y.?

A. They did.

Q. Were the drafts that you obtained and used for Ayres, Learned & Wiswall at the time you purchased the Calvin P. Austin mortgage charged to their account at the Bank of West Troy, N. Y.?

A. I suppose they were. I never examined the bank books. I have no doubt of that; they would not let us have six thousand dollars, without doubt, without charging it.

Q. Were they obtained from the bank on account of Ayres, Learned & Wiswall?

A. They were.

Q. Was the Calvin P. Austin mortgage being foreclosed at the time you purchased it?

A. I do not know.

Q. Did a foreclosure sale afterwards take place upon proceedings to foreclose that mortgage, at which the property sold was bid in to the members of the firm of Ayres, Learned and Wiswall?

A. I understand it was; it is not a personal knowledge of my own; I was not there when the sale took place.

Q. Was any person authorized by the firm of Ayres, Learned & Wiswall to attend that sale and bid in the property for them?

A. I have no personal knowledge.

Q. Have you any knowledge?

A. I have hearsay knowledge. I was out of the State when it transpired.

114 Q. Did the members of the firm of Ayres, Learned & Wiswall have an understanding among themselves that the property covered by the mortgage should be bid in in their name at that foreclosure sale?

A. It was my understanding that the property was to be bid in for the parties in interest.

Q. For what parties in interest?

A. Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall.

Q. Did those parties afterwards receive a commissioner's deed for the property bid in in their name at that sale?

A. They did.

Q. Did you, Mr. Ayres, send it from Sandutkay, Ohio, to James S. Ayres, Port Austin, Michigan, with instructions to have it recorded?

A. I don't recollect.

Q. Did the purchasers at that sale pay over to the commissioner who made the sale the sum of the purchase money?

A. I don't know; I have no knowledge.

Q. Is it not a fact that there was an understanding between yourself and Mr. Wiswall that the property covered by the Austin mortgage should be sold at that foreclosure sale and bid in for the members of the firm of Ayres, Learned & Wiswall, and a new mortgage given to Catherine A. Wiswall for the sum due upon Calvin P. Austin mortgage?

Objected to, as an irrelevant under the pleadings by defendants' counsel.

A. There was an understanding between me and Mr. Wiswall that the property was to be sold and bid in by the firm for the parties in interest, and a new mortgage given for the amount due Mr. Wiswall under the Austin mortgage; the whole amount paid on that mortgage did not belong to him; between four and five thousand dollars was paid to Ayres, Learned & Wiswall on the mortgage; there was never anything passed between me and Mr. Wiswall in in this connection with regard to Catharine A. Wiswall's rights in the mortgage; we treated it as the property of Ebenezer Wiswall.

Q. Was the sum of between four and five thousand dollars that you speak of being paid on the Calvin P. Austin mortgage, paid at the time of the purchase of the Calvin P. Austin mortgage?

A. It was.

Q. Did the firm of Ayres, Learned & Wiswall ever pay any other sum upon the Calvin P. Austin morgage afterwards, except the eleven hundred dollars paid to D. C. Holbrook for Calvin P. Austin?

115 A. I don't recollect anything else.

Q. Did the purchasers at the foreclosure sale of the Calvin P. Austin mortgage afterwards execute a mortgage to Catherine A. Wiswall for a sum claimed to be due on the Calvin P. Austin mortgage?

Objected to, as incompetent; the mortgage to Catherine A. Wiswall should be introduced.

A. Me and my wife executed such a mortgage; we signed such a mortgage.

Q. Did Ebenezer Wiswall sign that mortgage at the same time and place?

A. I didn't see him sign it.

Defendants' counsel here request the production of this mortgage in reference to which the witness is being examined.

Complainants' counsel asks this question for the purpose of showing the loss or the destrustion of the mortgage.

Q. Did Ebenezer Wiswall, after signing the mortgage, leave it in your possession at Sandusky, Ohio?

A. I have no recollection of ever seeing him sign it or seeing his name on the paper.

Q. Did Ebenezer Wiswall, after you and your wife had executed

the mortgage to Catherine A. Wiswall, leave it in your possession at Sandusky, Ohio?

A. My memory is that he did not.

Q. Did you not afterwards purchase revenue stamps and place them upon the mortgage?

A. I did not.

Q. Did you not, after purchasing revenue stamps and placing them upon the mortgage, forward it to James James S. Ayres at Port Austin, Michigan, to have it executed by Charles G. Learned and wife and placed upon record?

A. I have no recollection of having sent the mortgage to Port Austin, and I don't think I did; I am certain I did not purchase or put revenue stamps upon it.

Q. Did you have it in your possession for the purpose of examination, or for any other purpose, from the 27th day of January, 1869, until on or about the first day of March, 1869?

A. Mr. Wiswall came to the West House at Sandusky in the evening; me and my wife were there; he told me that he had a mortgage that he wanted executed by me and my wife, and that he was in a hurry, and the next morning thereafter me and my wife executed this mortgage as soon as we got our breakfast, and I delivered it to Mr. Wiswall, and my recollection is that Mr. Wiswall left Sandusky that forenoon and took the mortgage with him.

116 A. Who drew that mortgage?

A. I do not know.

Q. Was it in the handwriting of your son, James S. Ayres?

A. I think not.

Q. In whose handwriting do you recollect it to be?

A. I don't think I recognized the handwriting.

Q. Were you informed who drew the mortgage?.

A. I never was.

Q. Are you the only original mortgagor now interested or liable as between the original mortgagors for the payment of this mortgage?

Objected to by defendants' counsel, as incompetent; the mortgage should be introduced and proved by the record; it will show best the legal liabilities under it.

A. I don't consider I am the only one.

Q. You are the person who purchased the interest of Ebenezer Wiswall, in the property covered by the Catherine A. Wiswall mortgage, are you not?

A. Yes; I am.

Q. Is Charles G. Learned, who sold his interest in the property covered by the Catherine A. Wiswall mortgage to Ebenezer R. Ayres, the same person who was one of the original mortgagors named in the Catherine A. Wiswall mortgage?

A. If he is named in the Catherine A. Wiswall mortgage, he is the man.

Q. Letter shown to witness, and asked if it is his handwriting, marked exhibit A.

A. It is.

Letter marked Exhibit A offered in evidence. Objected to by defendants' counsel as irrelevant.

Q. What paper do you refer to in this letter as having been properly stamped and sent to Port Austin yesterday, with instructions to send the mortgage to you after it has been executed by Mr. and Mrs. Learned and recorded?

A. I have no recollection any farther than this letter brings it to my mind, and it is my present impression that the mortgage was not left with me, but with Mr. E. R. Ayres; the papers spoken of in that letter undoubtedly have reference to the Catherine A. Wiswall mortgage.

Q. Was the bond which accompanied the mortgage also one of the papers referred to in that letter?

A. I have no recollection anything about it.

Q. Did you execute the bond at the same time that you executed the mortgage?

117 A. I don't recollect.

Q. Do you know if the mortgage was sent to Mr. Wiswall from Port Austin, as stated in this letter?

A. I do not.

Q. Do you know of Mr. Wiswall afterwards having been furnished with a copy of the bond and mortgage by Ayres, Learned & Wiswall, or somebody acting for them?

A. I don't know.

Papers shown witness marked Exhibit B. Witness says this is signed by me.

Q. Do you know the other signatures?

A. I do; I think they are all genuine.

Q. Do you know in whose handwriting it, the body of the bond, is?

A. I think it is George Van Woert's.

Q. Was George Van Woert the book-keeper of your firm previous to February 27th, 1872?

A. I think he was book-keeper before that. I am sure he was.

Q. For about how long previous?

A. I don't know.

Q. Was he your book-keeper from January 27th, 1869, down to February 27th, 1872, or otherwise in the employ of your firm?

A. I don't know when he commenced book-keeping; he was otherwise in our employ before or after he was book-keeper; I cannot tell which.

Q. Was Mr. Van Woert in your employ in any capacity during that period?

A. I don't know when Mr. Van Woert commenced work in Port Austin. I think it was directly after the death of George Wiswall, and he was employed by Mr. Wiswall, and part by Mrs. Wiswall,

up to the time Charles Wiswall came out here, and after that was employed by the firm.

Q. Do you know in whose handwriting the words endorsed in red ink upon Exhibit B—"Duplicate Bond; the original lost, mislaid, or stolen"—is?

A. I can't tell; I don't hardly think it 's Van Woert's writing; it looks to me like James S. Ayres' writing, but I can't exactly identify it.

Q. Can you identify the signatures of the witnesses to exhibit B?

A. I can one, but not the other.

Q. Which one can you identify?

A. The signature of James S. Ayres.

Q. Is C. E. Wiswall, the other witness to Exhibit B, the same person you have spoken of as Charles Wiswall?

118 A. I don't know the signature; I don't recognize the sigture; I don't think I can tell the handwriting.

Q. Do you know C. E. Wiswall?

A. I do.

Q. Is he the same person you have spoken of as Charles Wiswall?

A. He is the same person.

Q. Do you know in whose handwriting the endorsement of June 14th, 1873, on Exhibit B, is?

A. James S. Ayres, as to the writing; the signature is Ebenezer Wiswall's attorney.

Exhibit B offered in evidence.

Objected to by defendants' counsel; it is not properly proved itself, and the endorsements are incompetent, irrelevant, and immaterial; it appears on its face that it is not the bond set up in the pleadings.

Q. Do you know how that duplicate bond came to be given?

A. On Mr. Wiswall's saying, or representing, that he had lost the original bond.

Q. Was he at the same time furnished with a copy of the original mortgage?

A. Not as I know of by our firm.

Q. Who is Ebenezer R. Ayres, that you have previously spoken of in your testimony?

A. He was one of the firm of Ayres & Learned, doing a lumber business in Sandusky, Ohio.

Q. Were you then connected with him in business in Sandusky, Ohio, at the time you think Ebenezer Wiswall left the Catherine A. Wiswall mortgage with him?

A. I have not said that he left the mortgage with him; I said he may have left it with him at the time spoken of; there was a business connection between Ayres, Learned & Wiswall and Ayres & Learned, of Sandusky, which, however, did not amount to a partnership.

Q. Is he your son, and one of the defendants in this suit?

A. He is, and made so by an after purchase from Gharles G. Learned and Jonas R. Learned.

Q. Did you occupy the same office in Sandusky, Ohio, at the time you think the mortgage might have been left with him?

A. The office was owned by Ayres & Learned, and the business done in the name of Ayres & Learned, and I was in the office there with them looking after the lumber business of Ayres, Learned & Wiswall.

Witness shown Exhibit C; says it is his handwriting.

Exhibit C offered in evidence.

119 Objected to by defendants' counsel, as irrelevant.

Q. What assignment do you refer to in this letter, when you state, "I will make a copy of the assignment as soon as I have opportunity"?

A. I have reference to the assignment that I instructed Mr. Holbrook to make of the Austin mortgage.

Q. Did you afterwards make a copy of that assignment?

A. I don't recollect; I don't think I had anything to do with putting the assignment into K. C. Barker's hands; I think Mr. Wiswall done that himself.

Q. Can you not now recollect that on paying the eleven hundred dollars balance to D. C. Holbrook, for Calvin P. Austin, that you obtained upon the order of Mr. Holbrook the assignment that had been deposited with K. C. Barker?

A. I am quite sure I did not; I have no recollection of Mr. Holbrook giving me anything but a receipt for the money and a satisfaction of the Austin claim.

Exhibit D shown witness.

My signature there is genuine.

Q. Can you now recollect that at the time this agreement was executed (Exhibit D), Calvin P. Austin had, on the 1st day of September, 1860, executed an absolute assignment of his bond and mortgage to Catherine A. Wiswall?

A. I do not; I have no recollection of ever having seen an assignment of the Austin mortgage to Catherine A. Wiswall.

Q. Would you have signed Exhibit D for Mr. Wiswall if you had not known that such assignment had been executed as therein stated?

Objected to by defendants' counsel, as improper in form to complainants' own witness, and because it presumes the instrument to be dated on the day it was executed, which is not shown.

A. I do not think I did sign it without instructions from Mr. Wiswall, and I have no idea that I signed it on the 6th day of October. I think if I had taken the responsibility upon myself of signing it without instructions from Mr. Wiswall, I should recollect it.

Witness is requested to produce the commissioner's deed, made by Chas. S. Nims to Frederick S. Ayres, Charles G. Learned, and

Ebenezer Wiswall; he produced the same, and it is marked Exhibit E and offered in evidence.

Objected to by defendants' counsel, as immaterial and irrelevant.)

Q. Was that deed left with you in Sandusky at the time you executed the mortgage.

A. I don't think it was.

120 Q. Were those stamps put upon the deed at Sandusky?

A. I don't think they were.

It is conceded by defendants counsel that the assignment of the Austin mortgage to Mrs. C. A. Wiswall is not among the papers of these defendants and cannot be found there.

Same concession is made as to the bond and mortgage, dated January 27th, 1869, running to Mrs. C. A. Wiswall. Defendants are permitted to retain in their possession, subject to call by the commissioner or complainants' counsel, Exhibit E.

Complainants' counsel here offers in evidence certified copy of the record of a mortgage made by Frederick S. Ayres and Charles G. Learned and Ebenezer Wiswall to Catharine A. Wiswall, hereto annexed, and marked Exhibit F.

Objected to by defendants' counsel, as incompetent, immaterial and irrelevant.

Also offers in evidence certified copy of the record of a deed from Charles S. Nims, circuit court commissioner, to Frederick S. Ayres, Charles G. Learned and Ebenezer Wiswall, dated January 27th, 1869, marked Exhibit G.

Same objection by defendants' counsel.

Also offer in evidence certified copy of the record of an assignment of mortgage by Catharine A. Wiswall to Charles E. Wiswall, and other complainants, dated the 25th day of February, 1874, hereto annexed, and marked Exhibit H.

Objected to by defendants' counsel, as incompetent, as not properly executed nor authenticated, and irrelevant and immaterial.

Also certified copy of the record of a contract from Frederick S. Ayres to James S. Ayres, dated the 23d day of August, 1867, hereto annexed, and marked Exhibit I.

Same objection by defendants' counsel as last above.

Also offers in evidence certified copy of the record of a contract between Ebenezer Wiswall and Frederick S. Ayres, dated the 31st day of October, 1871, hereto annexed, and marked Exhibit J.

Same objection by defendants' counsel as to the last instrument.

Also offers in evidence a certified copy of a contract dated October 20th, 1874, between Jonas R. Learned and Charles G. Learned, of the first part, and Ebenezer R. Ayres, hereto annexed, and marked Exhibit K.

Same objection by defendants' counsel as to last instrument.

Also offer in evidence certified copies of the original files in the case of Calvin P. Austin, complainant, against William A. Howard, Ellen J. Howard, Rollin C. Smith, Mary A. Smith, Alfred
121 A. Dwight, Laura A. Dwight, The Detroit Locomotive Works, William Warner, Thomas B. Ross, Roswell M. Reed, William L. Carpenter and Simon Smith, defendants, in the circuit court of the county of Sanilac, in chancery, hereto annexed, and marked Exhibit L.

Objected to by defendants' counsel, for same reason as applied to last instrument.

Q. Did your firm pay the costs of the foreclosure sale under the Calvin P. Austin mortgage?

A. I don't know how much we paid, and I don't know as we paid anything. I have got the impression that somebody from Lexington sent us a bill to Sandusky, when I was living there, relating to some of these matters, which I think was paid; this is a vague memory of mine, and, of course, not very authentic.

Q. Is the endorsement on Exhibit B, of February 27th, 1872, of the payment of eight thousand dollars, the first payment made upon the Catharine A. Wiswall mortgage?

A. I think not; I have not the record of these payments, but I think not.

Q. Did you keep an account of these payments upon the books of the company?

A. I don't know whether we did or not.

Q. Have you examined the schedule of payments set forth in the complainants' bill?

A. I don't think I ever read the complainants's bill.

Q. You have signed an answer in this case, have you not?

A. I suppose I have.

Q. In that answer you state that other and larger sums of money have been paid on the Catherine A. Wiswall bond and mortgage than stated in said complainants' bill; I now ask you what other and larger sums of money?

Hereupon adjourned to September 5th, 1879.

SEPTEMBER 5, 1879.

Examination of witnesses resumed.

FREDERICK S. AYRES called again by complainants.

Question last above repeated.

A. I have looked up my receipts and will tell you the payments, as far as I can find them: Paid E. Wiswall, March 15th, 1870,
122 $2,934.83; paid the same, February 27th, 1872, $8,000; paid the same, June 14th, 1873, $10,000. The balance of payments, if my memory serves me, were paid William Wiswall; after the assignment of the mortgage they were all paid to him: March 30th, 1876, $1,500; April 29th, 1876, $1,500; October 2d, 1876,

$1,200; November 3d, 1876, $1,200; October 25th, 1877, $1,000; December 14th, 1877, $5,000; November 25th, 1878, $1,289.29; September 5th, 1877, $50.

Q. Are these all the payments you claim to have been made on this mortgage?

A. They are all that I know of.

Q. Have you receipts for all these payments?

A. I can't find them all.

Q. How many can you not find receipts for?

A. Two.

Q. Which two?

A. March 15th, 1870, and September 5th, 1877.

Q. Will you now produce the receipts that you have?

A. I haven't them.

Q. Who has them?

A. They are in our office.

Complainants' counsel here requests that the receipts stated by the witness to be in his office be produced in evidence.

Q. Was the payment you refer to as March 30th, 1876, transmitted by draft or check?

A. I can't tell you.

Q. Was the payment of April 29th, 1876, transmitted by draft or check?

A. I can't tell.

Q. Was the payment of October 25th, 1877, paid in the same manner?

A. I don't know.

Q. Were the payments of October 2d and November 3d, 1876, paid by draft or check?

A. I can't tell.

Q. Are you positive that the payment of September 5th, 1877, was made to the complainant on the Catherine A. Wiswall mortgage?

A. It was paid to William A. Wiswall, in connection with the Catherine A. Wiswall mortgage.

Q. Was it made to William A. Wiswall as a payment on the Catherine A. Wiswall mortgage?

A. It was paid to William A. Wiswall as attorney for himself and others, owners of the mortgage.

Q. Was it not paid to him to reimburse him for traveling
123 expenses in coming here from the State of New York to Port Austin to obtain payment of this mortgage, because you were unable to make any payment, and desired an extension of time in which to make further payments?

A. It was paid to him for expenses upon other considerations than his coming out here.

Q. Did you ever have a receipt for the payment that you claim to have been made upon March 15th, 1870?

A. I have been unable to find it. I have searched for it, but cannot find it.

Q. In what manner was that payment made?

A. It was placed to his credit on the 15th day of March, at the National Bank of West Troy, at Mr. Wiswall's request.

Q. Was that the title of the bank at that time?

A. I think so.

Q. By what direction, or in what manner was this $2,934.83 placed to the credit of Ebenezer Wiswall at the bank in West Troy?

A. It was placed there by the direction of Mr. Wiswall to me. Mr. Wiswall was here in Port Austin at the time sick, and he told me that he had a note coming due at the bank of West Troy in a short time, of, I think he said, three thousand dollars, and he wanted me to pay some interest on the mortgage to pay this note with. I told him that we had not any money on hand that we could spare. After a little reflection, I told him I thought I could fix it for him, by sending a note to the bank of West Troy and getting it discounted. I then made a note of Ayres & Learned for three thousand dollars, payable at the bank of West Troy; the note was dated March 8th, 1870. It was discounted by the bank, and the proceeds, two thousand nine hundred and thirty-four dollars and eighty-three cents, placed to E. Wiswall's account in said bank.

Q. On what date was it placed to his credit?

A. On the 15th of March, 1870.

Q. How do you know that it was placed to his credit on that date?

A. I have the cashier's letter.

Q. To whom did you deliver that note when made?

A. I enclosed it in a letter here at Port Austin to Cashier Wilson, of the National Bank of West Troy. This was all done at his request, in my presence, in our office.

Q. Do you know the cashier's full name?

A. I think it is G. B. Wilson.

Q. Was that note or the proceeds of it charged to Ebene-
124 zer Wiswall in his account upon the books of Ayres, Learned & Wiswall?

A. I ascertained this spring or winter, by Mr. Van Woert, that when this statement came from Sandusky of Ayres, Learned & Wiswall's account with Ayres & Learned, that he had found this item in their account against us as paid to Mr. Wiswall, and without consulting any one, charged it in E. Wiswall's account. We searched in the office—Mr. Van Woert, James, and myself—for a long time for a voucher or a receipt for this money, and couldn't find one. I supposed this money was endorsed on the bond and mortgage by Mr. Wiswall. He was my partner, and my impression now is that it was endorsed upon the bond and mortgage.

Q. On what date was that sum charged to Mr. Wiswall on the books of Ayres, Learned & Wiswall?

A. I don't know the date, but it must have been a long time after the 15th of March, 1870. I never have looked at the account of Wiswall on our books to see how this was charged, and I only know from what the book-keeper tells me.

Q. Was it charged to Mr. Wiswall on his private account on the books of Ayres, Learned & Wiswall?

A. It was, as I understand, from the book-keeper.

Q. Was it so charged to his account before the 31st day of October, 1871?

A. I cannot tell without informing myself.

The counsel for the complainants now requests the witness to produce the books of account of the late firm of Ayres, Learned & Wiswall, called for in the subpœna issued by the commissioner before whom this testimony is being taken, and served on the witness September 3d, 1879, as appears by the return of the sheriff of the sheriff of the county of Huron, and asks the witness if he will now produce them in obedience to such subpœna?

Counsel for defendant advises witness that said subpœna does not oblige him to produce said books at this time; that witness, further, should not be examined with reference to this account on said books, because he has testified that he has never loooked at the account himself; and further advises witness that complainunt has no right to the defendants' books and papers while he is putting in his main case, to which defendant has as yet made no defense, and to which, as far as yet appears, defendants may make none; complainants's case is made out by the introduction of his bond and mortgage, and witness is advised not to produce the
125 books now. Complainants' counsel desires the books produced in obedience to the subpœna, for the purpose of having the witness refer to them and state from them the date of the charge to the account of Ebenezer Wiswall, in the sum of $2,934.83, that he states he is unable to give from memory, and not for the purpose of taking the books out of the custody of the witness or placing the books themselves in evidence. Defendants' counsel insists to the court that the production of the books called for is not necessary for the purpose stated.

A. I decline to produce the books, under instructions from my counsel.

Q. Do you give the date of the payments you have sworn to of your own knowledge?

A. I do not.

Q. Do you state them from memorandum?

A. Yes.

Q. How long ago was that memoranda made?

A. After I left the court-room last evening.

Q. Who made it?

A. I made it.

Q. From what was it made?

A. From papers in the office.

Q. From what did you make the memoranda of the payment of March 15th, 1870?

A. From papers in the office.

Q. State fully what papers.

A. Cashier Wilson's letter, and Ayres, Learned & Wiswall's letter, and Ayres & Learned's note for $3,000.00, dated March 8th.

Q. Did you refer to any other papers in making the memoranda you refer to?

A. Those mentioned, and receipts, checks, and notes.

Q. What firm became successors in business to Ayres, Learned & Wiswall upon the dissolution of the firm of Ayres, Learned & Wiswall?

A. Ayres, Learned & Co., composed of Frederick S. Ayres, Jonas R. Learned, and James S. Ayres.

Q. Did the firm go into possession of the assets and property of Ayres, Learned & Wiswall, and continue to carry on the same business?

A. They did not altogether, only in part.

Q. To what extent did they not?

A. The accounts of C. G. Learned, Frederick S. Ayres, James S. Ayres, and Charles Wiswall were all settled before the firm
126 of Ayres, Learned & Co. was formed.

Q. Was not also the account of Ebenezer Wiswall settled?

A. Yes.

Q. Is the firm of Ayres, Learned & Co. yet in existence?

A. No.

Q. What firm succeeded Ayres, Learned & Co. in business, and who composed that firm?

A. Ayres & Co., composed of Frederick S. Ayres, James S. Ayres, and E. R. Ayres.

Q. Is it the same Frederick S. Ayres and James S. Ayres that were members of each of these firms succeeding Ayres, Learned & Wiswall?

A. Yes.

Q. And you were a member of all three of the firms?

A. Yes.

Q. Did the firm of Ayres, Learned & Co. continue the business of Ayres, Learned & Wiswall, using the same book of account?

A. Yes, until the books were used up; they lasted but a little while.

Q. Did the firm of Ayres & Co. continue in the same business as Ayres, Learned & Co., and continue to use the same books?

A. Yes, until they were used up.

Q. Did each of the firms of Ayres, Learned & Co. and Ayres & Co. make part of the payments upon the Catherine A. Wiswall mortgage that you have testified to?

A. Yes.

Q. Did each of these firms assume, during their existence, the liability to pay that mortgage?

A. No.

Q. Were the payments made as partnership payments out of the assets of the respective firms of Ayres, Learned & Co. and Ayres & Co.?

A. They were made out of partnership property, but not as partnership payments.

Q. Did the three firms keep their accounts upon their books in double entry?

A. They did.

Q. Was there an account kept upon the books of those firms of the payments made upon the Catherine A. Wiswall mortgage?

A. I do not think there was any account kept with Catharine A. Wiswall, or with the Wiswall mortgage.

Q. Did the members of the firm of Ayres & Co., either as
127 a firm or as individuals, assume the liability of the payment of the Catherine A. Wiswall mortgage?

A. I do not know.

Q. How came it, then, that payments were made upon that mortgage out of the assets of the firm of Ayres & Co.?

A. Because we wanted the mortgage paid.

Q. Did that firm, as a firm, render statements to William McAlpine Wiswall, while acting as attorney-in-fact for the complainants, setting forth the sum of the mortgage and the payments made thereon?

A. I do not know.

Paper shown witness, hereto annexed, and marked Exhibit N.

Q. In whose handwriting is that paper?

A. James S. Ayres'.

Q. To what mortgage does that paper relate?

Objected to by defendants' counsel. The paper should be introduced and shown before witness is examined in reference to its contents. Defendants' counsel wants to see it.

Paper marked Exhibit N here offered in evidence.

Objected to, as irrelevant under the pleadings and as immaterial.

Q. To what mortgage does Exhibit N refer?

A. I can tell no further than the paper states. I did not write the letter, and never saw it until now.

Q. To what mortgage do you understand this statement to refer, when it states: Mortgage, dated January 27th, 1869, for $40,105, with seven per cent. interest, semi-annually?

A. If you want me to guess, I can guess it reads as though it had reference to the Catherine A. Wiswall mortgage.

Q. Do you understand the statement of payments thereon to refer to the same mortgage?

A. I do.

Q. Were any entries made upon the books of the three firms spoken of, of the payments made on the Catherine A. Wiswall mortgage?

A. On the books of Ayres, Learned & Wiswall there should have been entry of the first payment, March 15th, on the real estate account, I suppose, but I really do not know about this, not being familiar with the books.

Q. Did the firm of Ayres, Learned & Wiswall render to Ebenezer Wiswall a statement of his account, and of the account of Charles

E. Wiswall, from the books of the firm about the time or shortly before your purchase of his interest in the property of the firm?

A. I never did, and never knew that one was furnished
128 him. He was a member of the firm, and could command an account from the book-keeper if he wanted it. He got it that way, I suppose, if he got one.

Q. Did you and him have such a statement at the time you were negotiating for the purchase of his interest?

A. The negotiation for the purchase was made here in Port Austin; the bargain was made here; we both went to Detroit and from there to Sandusky, expecting to close it up at Sandusky, and then he wanted to go to Detroit; we went there, and then we closed it up. In the original contract made here, there was nothing said about my paying his account: when at Detroit he said he wanted me to pay his account, and Charles Wiswall's; I asked him how much it was; he said he did not know exactly, and I agreed to pay his and Charles' account, not exceeding a certain amount. That is my recollection of it; if he had any statement of account with him I did not examine it, and do not think he showed me any.

Q. Were you present when the contract was drawn between you and Mr. Wiswall?

A. Can't say whether I was there while Mr. Holbrook was writing it or not; was there before and after.

Q. From what did you and Mr. Wiswall learn the amount of his indebtedness and Charles G. Wiswall's, at the time it was stated in the contract between you?

A. From Mr. Wiswall's representations.

Q. At the time you made that purchase, was $3,000 charged to Mr. Wiswall in his account upon the books of the firm for the note you speak of having sent the bank in West Troy?

A. It was undoubtedly charged in his account at the time, but I did not know anything about it, and had not consented to the entry; it had no business there.

Q. Have you ever reimbursed him or in any other manner paid him back the $3,000 you claim to be erroneously charged to him?

A. I never agreed to pay it; I only agreed to pay his proper account, not exceeding a certain amount.

The answer objected to by complainants' counsel, as not responsive, the contract itself now in evidence being the proper evidence of the agreements between the parties. The counsel for the complainants now asks for a responsive answer, whether payment or reimbursement has or has not been made?

A. I never have nor never agreed to pay him.

Q. Have you or your firm ever notified Mr. Wiswall of the discovery of such an error?

129 A. We did not discover the error until last spring; I do not think he has been notified.

Q. Have you ever claimed to the complainants that there had been a payment made upon the mortgage, March 15, 1870, of $2,934.83?

A. I did not discover this error until this mortgage had been placed in Mr. Winsor's hands for foreclosure; I didn't consider that the plaintiffs had anything to do with this error in our books.

Q. The complainants' counsel requests a responsive answer to last question.

A. I never have presented the claim; I consider this answer responsive.

Counsel for complainants asks the commissioner to direct the witness to give a responsive answer to the question.

A. I have never made the claim to the complainants.

Q. Did the firm of Ayres & Co. cause a tender to be made of what they consider to be due upon this mortgage?

A. I understand they did.

Q. Was that tender made by the firm of Ayres & Co. or in their behalf?

A. I understand it was; I didn't make the tender; I was not present when it was made.

Q. Did you direct the tender to be made?

A. It was made with my consent and knowledge,

Q. Was it your understanding and direction that the tender should be made in behalf of Ayres & Co.?

A. I don't think I gave any special directions about it.

Q. Is the sum of money tendered, yet in the hands of Allan Sheldon, subject to the order of the complainants?

A. I do not know.

Q. You state in your answer that the mortgagors named in the Catherine A. Wiswall mortgage were indebted to Ebenezer Wiswall for moneys advanced on account of the firm of Ayres, Learned & Wiswall; do you wish now to be understood that that statement is correct?

A. I suppose the answer is correct substantially; I did not pay much attention to the answer when it was being read; I supposed the lawyers would get it about right.

Q. You further state in your answer that the sum of $21,000.00 had been advanced by said Wiswall to pay a mortgage upon the land of said firm held by one Calvin P. Austin; do you now wish to be understood that that money was intended to pay the mortgage?

130 A. I wish to be understood so distinctly, whether I said so in the answer or not.

Hereupon adjourned until to-morrow morning at 9 o'clock.

SATURDAY, *September 6th*, 1879.

Examination of witnesses resumed.

FREDERICK S. AYRES called again by the complainants.

Q. Was it a payment made in consideration of the purchase of the mortgage of Calvin P. Austin?

A. I cannot testify with regard to the answer; I do not know what is in the answer.

Q. Do you know what sum was embraced in the Catherine A. Wiswall mortgage to cover costs of sale or foreclosure under the Calvin P. Austin mortgage?

A. I never knew how the Catherine A. Wiswall mortgage was made up; Mr. Wiswall, when he brought it to me, did not explain, and I had no means of finding out at that time.

Q. Did you give the directions to have the property covered by the Calvin P. Austin mortgage sold at foreclosure sale?

A. I think not; I have no recollection of it.

Q. Were you the person who informed Ebenezer Wiswall that it would be sold, and when it would be sold?

A. I think not.

Q. Did you inform him that it would not be necessary for him to attend the sale?

A. I did not to my recollection; I don't believe I did.

Q. Did you inform him that the sale would not lessen his security?

A. I do not think I did.

Q. Did you ever inform the complainants in this case that you claimed the Catherine A. Wiswall mortgage was for a larger sum than it should be?

A. I don't think I did; the truth is I did not know that the Catherine A. Wiswall mortgage was for a larger amount than it should be until this suit was commenced, or the matter was left in Mr. Winsor's hands for collection.

Q. Who informed you of that fact?

A I think my attorney.

Q. Was it with your knowledge and consent that your son,
131 James S. Ayres, attended the foreclosure sale and bid in the property at that sale?

A. At the time of that sale I was living in Sandusky; I did not know when the sale took place; I don't think I know when the sale was advertised to take place, or was consulted about it at that time.

Q. Were you afterwards informed by your son of what was done at that sale in your behalf?

A. I was informed by my son that the sale had taken place, and that he had bid in the property; I don't think anything was said about my behalf.

Q. Have you ever since objected to or protested against what was done?

A. I never knew the particulars of what was done, any more than the general fact that the property was sold.

Paper shown witness marked Exhibit O; witness says it is his writing.

Exhibit O offered in evidence.

Objected to by defendants' counsel, as irrelevant to the issue raised or the pleadings herein; as containing mere hearsay, and as incompetent.

Here the direct examination of this witness is closed.

Cross-examination by JAMES J. ATKINSON, one of the solicitors for the defendants, Frederick S. Ayres and James S. Ayres:

Q. When Mr. Wiswall saw you at Sandusky and asked you to sign the Catherine A. Wiswall mortgage, what chance did he give you to examine its contents?

A. He came there in the evening, about 8 or 9 o'clock, to the West House, and said he had a mortgage, and wanted me and my wife to execute it; I went and saw my wife and consulted her, and told him we would execute it in the morning; I don't think I read the mortgage; I supposed at the time that the whole matter was made up here in our office at Port Austin, and took it for granted it was all right.

Q. Did he leave it with you over night?

A. My recollection is that I did not see the mortgage until the next morning, when it was brought out for execution.

Q. State whether your business at Sandusky at that time was separate from that of Ebenezer R. Ayres, and whether he was or was not working for you.

A. Ebenezer R. Ayres was in the firm of Ayres & Learned, which was entirely distinct from our own firm of Ayres,
132 Learned & Wiswall; I belonged to the firm of Ayres, Learned & Wiswall; he was not in my employ.

Q. What was the business of Ayres & Learned, and how large was it at that time?

A. The business of Ayres & Learned was that of manufacturing and selling lumber. They manufactured at Port Crescent, Mich., and sold at Sandusky, Ohio. E. R. Ayres had charge of the Sandusky branch of the business.

Q. State whether Mr. Wiswall at that time knew E. R. Ayres well, and was intimate with him.

A. Mr. Wiswall knew him from a child and their relations were friendly.

Q. Was the note of Ayres & Learned, which went to Mr. Wiswall to be applied on this mortgage, payable to Mr. Wiswall, and endorsed by him before it was sent at his request to West Troy?

Objected to by the counsel for the complainants; the note itself is the proper evidence of to who it was made payable and by whom endorsed.

A. The note was made in our office in presence of Mr. Wiswall by me, and endorsed by Ayres, Learned & Wiswall, and enclosed to the Bank of West Troy, or National Bank of West Troy, to be discounted, and the proceeds placed to Mr. Wiswall's account in the Bank of West Troy, by his direction.

Answer objected to by complainant's counsel as not responsive.

Defendants' counsel join in this objection.

Q. State whether the amount heretofore tendered to the complainants' solicitor in satisfaction of this mortgage, was the full

amount due upon said mortgage, for interest, principal, and costs of this suit, at the date of said tender.

Objected to as improper, because witness in his direct examination, in substance, stated that he did not personally know that the tender had been made.

A. I am so informed that it is the right amount.

Answer objected to by complainant's counsel as hearsay.

It is here conceded by complainant's counsel, as a data for future taxation of costs, that the only sum paid witness for attendance is sixty cents, which was paid on the service of subpœna.

Redirect examination:

Q. Is E. R. Ayres, that you have spoken of in your cross-examination, your son?

A. Yes.

133 Q. Who placed the signature to the note of March 8th, 1870, that you sent to the Bank of West Troy?

A. I did.

Q. What signature was placed there?

A. Ayres & Learned.

Q. Were your relations in business so close that you had authority to sign the name of Ayres & Learned?

A. I had power of attorney to sign notes and checks.

Q. Was the business of Ayres & Learned, and Ayres, Learned & Wiswall, of selling lumber at that time in Sandusky, conducted as one business, and the accounts of the business kept upon the same set of books?

A. It was not as one business. The lumber sold of Ayres, Learned & Wiswall was credited to them on the books of Ayres & Learned. Ayres, Learned & Wiswall had no books there.

Q. Were these credits absolute?

A. In one sense they were absolute. Ayres, Learned & Wiswall's lumber, when sold, was credited to them on the books of Ayres & Learned; at the end of the year, losses, and all the expenses and interest that had accrued in the business at Sandusky, was all made up in a gross amount, and then Ayres, Learned & Wiswall were charged of this gross amount in ratio to their lumber as compared with Ayres & Learned's lumber.

Q. Did that interest include interest on discount upon notes to carry on that business at Sandusky?

A. I understand it did; also office and yard rent.

Redirect examination now closed.

Recross-examination:

Q. You say the note of Ayres & Learned, given Wiswall March 8th, 1870, was endorsed by Ayres, Learned & Wiswall; who wrote that endorsement?

A. Ebenezer Wiswall.

Q. Was the lumber of Ayres, Learned & Wiswall and Ayres & Learned, at Sandusky, kept separate?

A. It was just as separate as though we had been strangers; Ayres & Learned, composed of E. R. Ayres and Jonas R. Learned, had no interest in the Port Austin business or in the Port Austin lumber in Sandusky.

Q. What further connection did Ayres & Learned, or either of them, at the time this mortgage and bond were executed, have with the firm of Ayres, Learned & Wiswall, or with you, other than that they were selling the lumber belonging to your firm at
134 Sandusky, and were keeping with your firm an accurate account of your lumber sold, crediting themselves with certain expenses of selling, and settling with you as with any other strangers, from time to time?

A. None other; I think the business was conducted the same as it would have been if we had been strangers.

Q. If at that time Mr. Wiswall handed this mortgage to E. R. Ayres, to have it further signed or recorded, was E. R. Ayres in any manner authorized to receive it for you, or must he have received it for himself?

A. He had no authority from me.

Q. Did you receive the power of attorney from Ayres & Learned after this time?

A. No, I had it at that time.

Q. You have stated, as I remember, that you did not read this mortgage when Mr. Wiswall brought it to you to sign; that as you recollect he took it with him and brought it back in the morning, when it was executed; what can you say as to the execution of the bond at the same time?

A. My recollection is that I did not see the mortgage at all in the evening before it was executed; in the morning, after breakfast, I saw it for the first time, as I remember it, and me and my wife executed it. I do not recollect when I executed the bond.

Q. Do you remember reading the bond?

A. My memory about that bond is very indistinct; I do not remember reading it.

Redirect examination:

Q. Who are the present owners of the property covered by the Catherine A. Wiswall mortgage, except the descriptions that have been sold from time to time by the members of the three firms you have spoken of?

Objected to, as incompetent; deed or record should be introduced to show this.

A. Frederick S. Ayres, James S. Ayres, and E. R. Ayres, excepting C. G. Learned's interest in some lands that he retained in his sale to E. R. Ayres.

Q. Have you in your possession the note you last referred to in your cross-examination?

A. It is in the possession of the company, but not in my personal possession.

Counsel for complainants here asks that the note be pro-
135 duced, defendants' counsel stating that it is in court.

Defendants' counsel says this note is for a large amount, which is in dispute; its loss would be a serious inconvenience to these defendants, and they request the counsel for complainants to accept instead of the note a copy, the accuracy of which the commissioner may pass upon.

Counsel for complainants accepts the proposition, if the original note is produced so that he may examine the signatures and question the witness in regard to it.

Counsel for defendants now submits a copy of said note, marked Exhibit P, which has been prepared under the directton of the commissioner, and is recognized by him as a copy.

And defendants give as a further reason why they cannot now offer the original note, that it belongs to Ayres & Learned, and they are not authorized to part with its possession.

Counsel for the complainants objects to the introduction of the copy of the note, because he has not been permitted to examine the original for the purpose before stated, and asks the commissioner to minute the refusal to permit him to see the note.

The counsel for the complainants was not permitted to examine the original note.

The counsel for the complainants states that he has no further questions to ask this witness, on account of his not being permitted to examine the original note.

SEPTEMBER 8, 1879.

After reading the witness testimony to this point, the examination is resumed by complainants' counsel.

Q. At the time you went to Detroit to purchase the Calvin P. Austin mortgage, are you positive that you took with you twenty-seven thousand dollars?

A. I am.

Q. Are you positive that six thousand dollars of that sum belonged to Ayres, Learned & Wiswall, and was drawn from the Bank of West Troy on their account?

A. I am certain that the six thousand dollars belonged to Ayres, Learned & Wiswall, and the money was drawn from the Bank of West Troy.

Q. In determining the amount due upon the Catherine A. Wiswall mortgage, for the purpose of making a tender, at what
136 rate was the interest computed for the money advanced by Wiswall down to the time the Catherine A. Wiswall mortgage was executed?

A. I never made any such determination, and was not present when it was made and had nothing to do with it.

Q. Do you know at what rate the computation was made?

A. I don't know how it was made up.

Q. Do you know of your own knowledge that the Catherine A. Wiswall mortgage was given for a larger sum than it should have been?

A. I only know, as I have stated, from information.

Recross-examination:

Q. How are you informed this interest was figured?

Objected to by complainants counsel, as immaterial.

A. I am informed it was figured from the 6th of October, 1860, to June 1st, 1862, at ten per cent. per annum on twenty-one thousand dollars, and from June 1st, 1862, to January 27th, 1869, at seven per cent. per annum, and at seven per cent. thereafter.

Redirect examination:

Q. Who informed you of this?

A. I know the general fact of how the interest should be computed. I had nothing to do with the computation. I have learned from my son James S. Ayres how it was computed; he showed me a paper how it was computed.

Q. Why did you stop computing interest at ten per cent. on the 1st of June, 1862, on the Calvin P. Austin mortgage?

A. Because Mr. Wiswall agreed to make it seven from that date.

Q. Is that agreement in writing?

A. I think not.

F. S. AYRES.

Subscribed and sworn to before me, this 8th day of September, A. D. 1879.

GEORGE C. GREEN,
Circuit Court Commissioner, Huron County, Michigan.

137 *Testimony of James S. Ayres.*

JAMES S. AYRES, a witness produced, sworn, and examined on the part of the complainants.

Q. Please state your age and place of residence.

A. In my 42d year; resident at Port Austin.

Q. Are you one of the defendants in this case?

A. I am.

Q. And a member of the firm of Ayres & Co.?

A. I am.

Q. Where were you residing on the 6th day of January, 1869?

A. Port Austin, Mich.

Q. Did you attend the sale under the foreclosure proceedings brought to foreclose the Calvin P. Austin mortgage?

A. I attended a sale made of some property in Huron county, which I am informed was made in pursuance of foreclosure proceedings of the Austin mortgage. Do not know that it was so of my own knowledge.

Q. Do you know who became the purchaser of the property there sold?

A. I understood it was bid in for Frederick S. Ayres, Charles G. Learned and Ebenezer Wiswall.

Q. State who attended that sale and bid in the property in their name?

A. I did, if my memory serves me rightly.

Q. Was the Commissioner's deed in pursuance of that sale delivered to you?

A. It was not in the first instance, but I think it has been in my possession since. I can't say at what time it was in my possession.

Q. Did it come into your possession between the fifth and eleventh days of March next after the sale?

A. I cannot say from present memory, but think I could refresh my memory by looking at the deed.

Q. Please do so.

A. The deed is not here, but at the office.

Witness, after looking at the certified copy of deed marked Exhibit G, says, I think I had this deed in my possession between the dates you state.

Q. Did you also receive the Catharine A. Wiswall mortgage and bond between these dates?

A. I do not recollect of receiving them. I don't think I ever saw the original bond.

138 Q. Did you present the original mortgage to Charles G. Learned for execution by himself and wife?

A. I don't recollect that I did.

Q. Did you present the original bond to him for his signature?

A. I think not. As I said before, I don't think I ever saw the original bond.

Q. Did you deliver the commissioner's deed and the Catherine A. Wiswall mortgage to the register of deeds for record?

A. I think I delivered the commissioner's deed to the register, and if I received the mortgage at the same time I did the deed I probably delivered that also to the register, but have no recollection of doing so.

Q. Did you afterwards obtain them from the register when recorded?

A. As to the deed, I do not recollect whether the register brought it to our office or I called for it at his office, but I think it was delivered to us, as I find it among our papers. As to the mortgage, I have no recollection about its being recorded or of its delivery to us after its being recorded.

Q. To whom do you refer when you say "delivered to us?"

A. To any of the company doing business here at that time, or any one authorized by said company to receive such papers.

Q. What company was then doing business here?

A. Ayres, Learned & Wiswall.

Q. What relation did you then have to the business of Ayres, Learned & Wiswall; I mean in March, 1869?

A. I cannot recollect, but could refresh my memory by examination of the contract between Frederick S. Ayres and J. S. Ayres, or a certified copy of the same, marked Exhibit I in this case.

[Witness looks at Exhibit I.] I was here working for my father; don't think I had any interest in the business then.

Q. Do you mean working in the business of Ayres, Learned & Wiswall?

A. I do.

Q. Did you attend to the conveyancing of the business at that time?

A. I don't recollect that I did at that time; I did at one time. I have no data now to fix the time when I commenced attending to that. Before I came Mr. Van Woert attended to that, and continued to do so for a time after I came here; I cannot say how long. I could answer more definitely after examining papers in the office.

Q. Did you come here in 1867 to reside?

A. I think it was about that time.

139 Q. You have been familiar with the business of Ayres, Learned & Wiswall, and succeeding firms, from that time down.

A. I became somewhat familiar with the business of Ayres, Learned & Wiswall about a year after I came here; was a member of the other two firms and familiar with the business, but was not a member of the firm of Ayres, Leonard & Wiswall.

Q. Were the books of these firms kept in double entry form?

A. The books of Ayres, Learned & Co., and Ayres & Co. were, and the books of Ayres, Learned & Wiswall soon after I came.

Q. You have made some of the payments, have you not, on the Catherine A. Wiswall mortgage?

A. I think I have made notes and drafts, or checks, in the name of Ayres, Learned & Co., or Ayres & Co., or both, which were understood at the time were to apply on the mortgage when paid.

Q. Were some of these notes, checks, or drafts remitted by you to William McAlpine Wiswall, one of the complainants in this case?

A. I think some of them may have been.

Q. Did he then reside in the State of New York?

A. I don't recollect the date of remittances. Mr. William Wiswall lived here in Port Austin, I think, one or two years after I came here, and I think he has since resided in the State of New York.

Q. Have not all payments been made to him since the complainants became possessed of the mortgage?

A. Such payments as I have made for the parties interested I have made to him. I have not made all the payments since the assignment of the mortgage to the complainants.

Q. Would not payments remitted by check or draft from here be several days before reaching him in New York?

A. In the ordinary course of the mails it would take several days to reach him. It takes now three days and a half.

Q. Were several of those payments remitted by draft on E. R. Ayres, Sandusky, Ohio?

A. I can recollect of two only. I think there may have been one more.

Q. Were the payments of March 30th and April 29th, 1876, and October 25th, 1877, so remitted?

A. I think the payments of March 30th and April 29th, were drafts on E. R. Ayres of those dates, or thereabouts, but the remittance of October 26th, 1877, was by check or note.

140 Q. Will you state as to the remittance of October 2d and November 3d, 1876?

A. I can't say whether those dates are accurate. I think they were remitted on or about those dates, either by note or a draft on E. R. Ayres.

Q. To what account were those payments charged when made?

A. I don't recollect. I think they were charged to mortgage account.

Q. Have you an account upon your firm books with the Catharine A. Wiswall mortgage?

A. We have not an account so entitled, but have an account called mortgage.

Q. Are there any entries upon that mortgage account growing out of any other mortgage?

A. Cannot say, as this is an account that is carried forward for a good many years, some of the entries in which were made before I came here.

Q. Have you not examined that account with reference to this suit or the claim made by William McAlpine Wiswall upon this mortgage?

A. I have not.

Q. Had Catharine A. Wiswall an account upon those books?

A. Not to my knowledge.

Q. Can you state in whose handwriting the endorsement in red ink on Exhibit B is?

A. Yes; it is mine.

Q. Do you know from what Exhibit B was made or copied?

A. I do not.

Q. Have you or your firm the original bond or a copy thereof?

A. I do not think we have.

Q. Do you know who signed the name of C. E. Wiswall to Exhibit B as a witness?

Objected to by defendants' counsel as immaterial and irrelevant.

A. I do not. I do not recollect as I ever saw him sign his name, or that I ever received a letter from him in which his name was signed.

Q. You are the other party, are you not, who signed that as a witness?

A. Yes.

Q. Is the body of the second endorsement of payments thereon in your handwriting?

A. Yes.

Witness shown Exhibit N; says the person to whom this is addressed is one of the parties to this suit.

141 Q. Is it written by you in relation to the Catharine A. Wiswall mortgage?

A. I think it was.

Q. Have you been connected with the business of Ayres, Learned & Wiswall, and their successors, from and including the time the Catherine A. Wiswall mortgage was given?

A. I was here for father from January, 1869, until the dissolution of the firm of Ayres, Learned & Wiswall, and have been a partner of the two succeeding firms.

Q. Were you in the office of Ayres, Learned & Wiswall, transacting business from day to day, from the time that mortgage was given?

A. I have been in the office pretty steadily from January, 1869, down to the present time, except when I have been occasionally away to be gone from two to four weeks. I think I have been absent at one time about two months or longer.

Q. Was the Catharine A. Wiswall mortgage in your handwriting?

A. I think it was not. It is my impression that the mortgage and deed were in the same hand. I mean the commissioner's deed in evidence.

Q. At the time you bid in the property at the Austin foreclosure sold, was there any money or other consideration passed to the commissioner?

A. Not to my knowledge.

Q. Did you attend to having a number of descriptions of land excepted from the Catharine A. Wiswall mortgage that was bid in by you, and included in the commissioner's deed?

A. I did not, if I recollect rightly. Messrs. Divine & Wixson, as attorneys, attended to the foreclosure sale and gave directions in relation to the sale, and I did not assume to act except under the direction of the attorney.

Q, Were they the attorneys of Ayres, Learned & Wiswall at that time?

A. I do not recollect that they were; they may have been acting for Mr. Wiswall.

Hereupon adjourned to September 8th at 1 p. m.

SEPTEMBER 9TH, 1879.

Examination of witnesses resumed.

JAMES S. AYRES called again by the complainants.

142 Q. How long was it after the sale under the Calvin P. Austin mortgage before Mr. Wiswall reached Port Austin?

A. I have no knowledge.

Q. When he did reach here was there some disagreement as to the manner in which the property sold under the Austin mortgage had been bid in?

A. There was not to my recollection.

Q. Do you not recollect that he was especially dissatisfied as to the manner of the sale of the lot upon which the mill, salt works, block, &c., were situated?

A. I do not. I had nothing to do with the manner of the sale of that lot.

Q. Do you know under whose direction Divine & Wixson were giving attention to that foreclosure sale?

A. I no not know of my own knowledge, but I have my impression in that regard.

Q. From whom did you receive these impressions?

A. I do not recollect.

Q. By whose solicitation or direction did you attend the sale to bid in the property?

A. I do not recollect, but think Divine & Wixson.

Q. Was not Frederick S. Ayres, as a matter of fact, managing and directing the foreclosure of the Calvin P. Austin mortgage?

A. I do not think so. I think Mr. Wiswall was attending to that.

Q. Is the sum of money that was tendered by Ayres & Co. to complainants' solicitor yet in the hands of Allan Sheldon, of Detroit?

A. It was not tendered by Ayres & Co., but there was a sum of money tendered for and in behalf of Ayres & Co. There is now in the hands of Allan Sheldon, of that sum tendered to complainants' solicitor, the sum of sixteen thousand dollars, subject to call by the parties interested, and the balance of the sum of money so tendered has been placed in United States four per cent. bonds, at a cost of two and a quarter per cent. premium, as I understand, and deposited with Mr. Magon, banker, of New York city, by Frederick St. John Lockwood, of Norwalk, Conn., subject to the call of the parties interested.

Q. Is Allan Sheldon instructed by Ayres & Co. to pay over that sixteen thousand dollars upon a request of the complainants or their solicitor, to apply upon the Catherine A. Wiswall mortgage?

A. This is rather a hard question to answer, put in this
143 way. I can state what the arrangement is with Mr. Sheldon in regard to that money.

Q. Can that money be drawn by the complainants in part payment of the Catherine A. Wiswall mortgage?

A. I do not know. The defendants desire and intend to pay the full amount due to the complainants on said mortgage, and have made a tender to the complainants, in United States legal tender notes, by and through Allan Shelden, of Detroit, of the full amount due on said mortgage, for principal, interest, and costs of this suit to the date of said tender, and in excess of said amount, and has tendered about one hundred dollars more than is legally due for said purpose, as they are advised by their solicitor. I have not tried to draw the money to make a part payment of said mortgage. We have agreed to pay ten per cent. interest for the use of that money, and to secure the payment thereof, have given a note for sixteen thousand dollars, payable in five years, with interest at ten per cent. per annum payable annually, which said not is secured by

mortgage on some of the real estate covered by the Wiswall mortgage.

This part of the answer, in regard to the manner of raising the money, the counsel for the complainants objects, because not responsive.

Q. Can the complainants draw the sixteen thousand dollars you state is yet in the hands of Allan Sheldon for the purpose of applying the same as a payment upon the Catherine A. Wiswall mortgage?

A. I do not know; have not tried to draw the money for that purpose, as we do not desire to draw the money to be applied for the purpose of making a part payment on the mortgage; we want to pay the mortgage in full, and get a discharge.

Cross-examination:

Q. During the proceedings to foreclose the Austin mortgage, were you at Lexington when the court was held?

A. I was not.

Q. Where did the sale of the commissioner take place?

A. At the court house in Port Austin.

Q. Were you a party to or in any manner interested in those foreclosure proceedings?

A. I was not a party to them, nor interested in the least in those proceedings.

Q. Had you at the time become a partner in the firm of Ayres, Learned & Wiswall?

144 A. I had not. I never was a partner in the firm of Ayres, Learned & Wiswall.

Q. To what date did that firm continue in business?

A. To the fall of the year 1871.

Q. In what capacity did you work at Port Austin in connection with that firm while it existed?

A. As a clerk only. Charles G. Learned, one of the partners of said firm, being the resident manager of the business during that time.

Q. What part of the business of the firm did you pay attention to?

A. Buying goods for the store and putting prices on same, and working in the office.

Q. Were your duties limited to the daily running business in connection with the work above stated?

A. It was. I acted in a subordinate capacity, only the partners of said firm taking the general management of the business.

Q. What knowledge did you have of the state of the different partners' accounts during that time in respect to each other?

A. I had no knowledge. I may have been informed.

Q. What instructions did you have from Divine & Wixson about bidding on the different pieces of land, and as to what amount you should bid at the Austin foreclosure sale?

A. I do not recollect now whether I was advised by Divine &

Wixson personally or by letter, but I think I was directed by them to bid on each description of land sold; I do not recollect the amount on each description, but the gross amount on all the descriptions sold was nineteen thousand one hundred and fifty dollars.

Q. When you wrote on Exhibit B the endorsement, duplicate, &c., under whose direction were you acting?

A. Ebenezer Wiswall's. He represented to me that the original bond he had lost, and that this bond was a correct copy of the original bond, and requested me to execute the bond. I told him I was not a party to the mortgage; that I was not a party to the original bond, and what interest I had in the property had been acquired afterwards.

Recross-examination:

Q. You have endorsed payments upon that bond, have you not, since it was made?

A. The body of the second endorsement, which was signed by Eben. Wiswall, is in my handwriting.

145 Q. Was the indorsement in red ink upon Exhibit B when it was signed?

A. To the best of my recollection that endorsement was made when I signed the bond, and I was the last to sign the bond.

Q. Did not Frederick S. Ayres insist that that endorsement should be made before he would sign the bond?

A. That is not my recollection of it.

Q Was not Exhibit B made pending the negotiations which culminated in that contract between Ebenezer Wiswall and Frederick S. Ayres, this contract being dated October 31, 1871?

A. I don't know when this exhibit was made, nor when it was executed; don't think I have any way of fixing the time.

Q. Was there a copy of the mortgage made at the same time?

A. I think not. I understood Mr. Wiswall to say the mortgage was lost.

Q. Was there a copy of the mortgage obtained from the record and accompanied that bond at the time it was signed?

A. Not that I know anything about.

Q. Will you state how long the negotiations were pending between Frederick S. Ayres and Ebenezer Wiswall before they culminated in a contract?

A. I cannot fix the date when the negotiations began, and was not in Detroit when the contract was executed.

Q. At the time of the Austin mortgage sale, were you here under an agreement with Frederick S. Ayres for a 2-20 interest in the property sold?

A. I think I can tell after referring to the contract between F. S. Ayres and myself. (Witness, looking at Exhibit I, says:) I was not.

Q. Were you not here for some time under that agreement before it was committed to writing and executed?

A. I was not. An agreement was drawn by myself several years before this contract was executed, and was not submitted to my

father until a short time prior to the execution of this contract. After making some changes in the original draft of contract the contract was executed; of which Exhibit I purports to be a certified copy.

Q. Were you not here from the date to the execution of that contract under a parole agreement with your father that such a contract should be executed?

A. I was here with an understanding between us that he would give me a part of his interest in the business or property.

Q. Where did Ebenezer Wiswall live during the existence of the firm of Ayres, Learned & Wiswall?

146 A. In West Troy, or rather Watervliet.

Q. You say that he claimed to you that he had lost the original mortgage and bond; how did he claim to have lost it?

A. He represented to me, or to father in my presence, that he had lost it; do not recollect how he said he lost it.

Q. Was that the reason that this duplicate bond was signed by your father?

A. Don't know why father signed the bond; don't recollect that I was present when he signed it.

Q. Was it subsequent to that claim that Exhibit B was executed?

A. I do not know; I have no memorandum by which I can refresh my memory as to the time of the execution of the bond marked Exhibit B.

Q. Was it subsequent to the claim by Mr. Wiswall that the original bond was lost that you made the endorsement of payment on Exhibit B?

A. I think so.

Q. Was Charles G. Learned here in Port Austin at the time the sale under the Austin mortgage took place?

A. I think he was; he very seldom went away from home.

Q. Did he have anything to do with the bidding at the sale?

A I don't think he bid in any of the descriptions sold.

Q. Do you know of his having anything to do with the foreclosure proceedings under the Austin mortgage?

A. I do not; I don't think I know of anybody having anything to do with the foreclosure proceedings further than what I have stated about the sale.

It is conceded that but sixty cents has been paid this witness to date for attendance.

J. S. AYRES.

Subscribed and sworn to before me this 9th day of September, A. D. 1879.

GEORGE C. GREEN,
Circuit Court Commissioner, Huron County Michigan.

147 GEORGE H. VANWOERT, witness produced, sworn and examined on the part of the complainants:

I am fifty-one years old, and reside at Port Austin.

Q. From what year have you resided in Port Austin?

A. From 1862.

Q. During what portion of that time have you been in the employ of Ayres, Learned & Wiswall and the succeeding firms?

A. I was employed in connection with the business of these firms the whole time up to May of this year; for a portion of that time I was paid by Mr. Wiswall—that is to say, my wages were charged to Mr. Wiswall's account for a portion of that time; since that time have been employed by the different firms

Q. Have you been familiar with the conduct of the business of the different firms during that period?

A. I have; pretty familiar.

Q. Who has been the controlling or managing partner during that time?

A. Neither partner has had entire control.

Q. Who has had the principal control of the business?

A. F. S. Ayres.

Q. In Frederick S. Ayres' absence from Port Austin, who represented him or looked after his business since James S. Ayres came to Port Austin?

A. Since the dissolution of the firm of Ayres, Learned & Wiswall, James S. Ayres.

Q. Who has done the principal part of the correspondence?

A. James S. Ayres, since the dissolution of the firm of Ayres, Learned & Wiswall.

Q. From 1867 down to the dissolution of the firm of Ayres, Learned & Wiswall, who attended to making the conveyances?

A. I think James S. Ayres principally.

Q. Have you been the book-keeper of these several firms during a large portion of the time you were in their employ?

A. I have.

Q. Can you state how the account of payments upon the Catherine A. Wiswall mortgage has been kept on the books of the respective firms?

A. I think the first payments were charged to Catherine A. Wiswall, and afterwards transferred to a mortgage account, and payments after that charged to mortgage account; that is my recollection of it.

148 Q. Among those payments do you know of any being charged in the sum of $2,934.83?

A. I have no recollection of it.

Q. You heard Frederick S. Ayres' testimony in regard to a $3,000 note sent to the National Bank of West Troy?

A. I did.

Q. To whose account was that note charged?

A. If that was the same note that we made the examination of Mr. Wiswall's account for last winter, it was charged to Ebenezer Wiswall.

Q. When was Ebenezer Wiswall's account closed upon the books of the firm?

A. I think at about the time he sold out to Mr. Ayres. Can't tell at what time a balance was struck without looking at the books.

Q. Did he have a statement from the books of his account during the time negotiations were pending for the sale of his interest in the firm business and property?

A. I think he did.

Q. About what time was the charge made to him of that $3,000 note?

A. I cannot tell without referring to the books.

Q. Was it prior to the time Mr. Wiswall was negotiating for the sale of his interest in the property?

Objected to by counsel for defendants, it not being shown that witness knew when the negotiations for the sale were entered upon by Mr. Ayres and Mr. Wiswall, and it not being reasonable to suppose that he, a mere clerk in their employ, would know when they commenced talking of this transaction, which was a private one between them, and because it further appears that the charge, if so made, had not come to the knowledge of Mr. Ayres.

A. The charge was made between the time. It was made at Sandusky, and the following May.

Q. Statements came from Sandusky here, how often and about what periods in the year?

A. I think they came monthly.

Q. At the time the statement was rendered to Mr. Wiswall of his account, was that note of $3,000 charged to his account?

Objected to by defendants' counsel, as immaterial, unless it be shown that Mr. Ayres handed Mr. Wiswall this statement, and that both noticed this charge in it.

A. I think he had a statement after that charge.

149 Cross-examination:

Q. Were you book-keeper during any part of the time that you were in the pay of Mr. Wiswall representing him in this business?

A. I was a part of the time. It was only a short time during that period that I had entire charge of the books.

Q. You say there was an account with Catherine A. Wiswall on the book of Ayres, Learned & Wiswall; was that the account that was indexed Catherine A. Wiswall mortgage?

A. I have no recollection of any account being indexed as Catherine A. Wiswall mortgage.

Q. How did you come to charge the $3,000 payment on this mortgage to Wiswall?

Objected to by complainants' counsel, because it assumes that the $3,000 was a payment upon the mortgage.

A. Because from the statement rendered from Sandusky by Ayres & Learned, I presumed it to belong to Mr. Wiswall's account.

Q. Did you as book-keeper enter up the statements from San-

dusky promptly as they were rendered, or did they in the press of business sometimes accumulate, to be charged up several at one time?

A. I allowed them to accumulate as a matter of convenience; several at once were entered more easily than separately.

Q. When did F. S. Ayres come to Port Austin to reside in reference to the dissolution of the firm of Ayres, Learned & Wiswall?

A. I think it was before the dissolution. I think it was some time in 1870.

Q. Do you swear that up to that time, from the time you came to Port Austin, F. S. Ayres was the manager of the business at Port Austin of Ayres, Learned & Wiswall?

A. I have not so stated.

Q. Who was?

A. C. G. Learned was manager at Port Austin.

Q. Was not Port Austin the only place of business of Ayres, Learned & Wiswall?

A. The only place I know of.

Re-direct examination:

Q. The firm of Ayres, Learned & Wiswall had some business interests in Sandusky down to the dissolution of the firm?

A. They sent lumber manufactured at Port Austin to Sandusky to be sold.

150 Q. The funds for carrying on the business here were supplied from Sandusky, were they not?

A. They received some funds here that were not from Sandusky.

Q. Did Charles G. Learned have anything to do with the business here from February, 1870, to the dissolution of the firm?

A. I can't say; don't know of his having anything to do with it for a time before the dissolution.

Q. What did Ebenezer Wiswall have to do with management of the business of Ayres, Learned & Wiswall during the existence of the firm?

Objected to by defendants' counsel. Mr. Wiswall having worked principally for the firm in the East, in the way of buying goods, negotiating money, paying bills, etc.; this witness, who was a clerk about the store at Port Austin, is not competent to answer this question.

A. I can't state what he may have to do with it.

Q. Were not all the statements you have spoken of as receiving from Sandusky entered upon the books of Ayres, Learned & Wiswall before the first of May each year?

A. They were on such years as we made our inventory and closed our accounts on the first of May.

Q. Do I now understand you correctly, that the statements down to the first of April in each year, were entered upon the books here at Port Austin on or before the first of May in each year?

A. They were as I recollect.

G. H. VAN WOERT.

Subscribed and sworn to before me, this 9th day of September, A. D. 1879.

GEORGE C. GREEN,
Circuit Court Commissioner, Huron County, Michigan.

I, the subscriber, the circuit court commissioner aforesaid, do hereby certify and report that I have taken the foregoing proofs in this case on the part of the complainants, the same being closed September 9th, 1879, and such proofs are hereto annexed as a part of my report, together with the notice and stipulations under which said proofs were taken.

Dated September 9th, 1879.

GEORGE C. GREEN,
Circuit Court Commissioner, Huron County, Michigan.

151 EXHIBIT A.

SANDUSKY, *March* 5, 1869.

E. WISWALL, Esq.

DEAR SIR: Yours of the 1st instant has just come to hand and contents noted. All of the paper has been properly stamped and sent to Port Austin yesterday, with instructions to send the mortgage to you after it has been executed by Mr. and Mrs. Learned and recorded. I was not able to get the revenue stamps until yesterday morning, and the largest I could get was 5 dollar stamps; I bought five of them. Money here is about as close as it was last December, and I think collections are not as good. Our sales for the last month have been very good, mostly on time. We shall run the stock down as low as we can before the opening of navigation; we have just been able to collect money to pay notes and drafts as they mature.

We will send you the money as soon as we can possibly do so. As to the Ludlow land, I was advised from Port Austin that it was not worth buying. The prospect for lumber the coming season is good; the old stock will be sold down close.

I have not returned my income for the past year, but intend to do so in a few days, and shall estimate it at 5 thousand dollars.

Yours, truly,

F. S. AYRES.

EXHIBIT B.

Know all men by these presents, that we, Frederick S. Ayres and Charles G. Learned, of Port Austin, Michigan, and Ebenezer Wiswall, of West Troy, New York, are held and firmly bound unto Catherine E. Wiswall, of West Troy, New York, in the sum of eighty thousand dollars, good and lawful money of the United States, to be paid to the said Catherine A. Wiswall, her executors, administrators, and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with our
152 seals, dated this 27th day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

The condition of this obligation is such, that if the above bounden Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, their heirs, executors, and administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above named Catherine A. Wiswall, her executors, administrators, and assigns, the just and full sum of money that may be legally due on a certain mortgage dated January twenty-seventh, one thousand eight hundred and sixty-nine, and executed by Frederick S. Ayres, Eben. Wiswall, Nancy Ayres, Charles G. Learned, and Maria Learned, unto Catherine A. Wiswall, and recorded in the clerk's office of Huron county, Michigan, March 14th, 1869, at 11 o'clock a. m., then this obligation to be void and of no effect, or else to remain in full force and virtue.

In witness whereof, we have hereunto affixed our hands and seals the day and year first above written.

EBENEZER WISWALL. [L. S.]
F. S. AYRES. [L. S.]
CHARLES G. LEARNED. [L. S.]
(As security), J. S. AYRES. [L. S.]

Witnessed by—
J. S. AYRES.
C. E. WISWALL.

Written across face in red ink: Duplicate bond, the original lost, mislaid, or stolen.

DETROIT, *February 27th*, 1872.

Received on the within bond eight thousand dollars, to apply on account of interest.

EBEN. WISWALL.

Received, West Troy, June 14th, 1873, ten thousand dollars, on account of interest and principal of the within bond.

EBEN. WISWALL, *Attorney.*

153 EXHIBIT C.

MICHIGAN EXCHANGE, DETROIT, *October* 30, 1860.

E. WISWALL.

DEAR SIR: I wrote you soon after I came out here in relation to the Austin mortgage. The mortgage is in the hands of Mr. Baker. Mr. Baker has been (and is now out of town) away out of town. I will make a copy of the assignment as soon as I have an opportunity. Your gun, I think, is here; I am not sure that this gun is yours; I think it is; they do not seem to know whose gun it is here, but think it is not yours. Give me a minute description of your gun by return mail, and if I conclude that it is yours I will send it by express to you. I have found a good deal of difficulty in getting vessels for lumber, but am in hopes I shall have no more difficulty. I chartered a vessel in Chicago for grain to Port Austin, and a load of lumber back. I suppose the grain is there now. The

corn cost 38½ cents free on board, and the oats 19½ cents. Freight got on corn, 8 cents; on oats; this is a high price freight on the oats, but the best I could do. I have bought 400 barrels of flour here, and intend to buy 200 more in a day or two.

Don't ship any goods by canal much after the first of November, but ship by R. R. to Buffalo and Ward's propeller to Detroit. I am afraid of detention on the canal. Charles left here last Saturday night for Cleveland; he has gone to see Marriat; I am in hopes he will be back this week; he may go to Troy.

Our logs on the lake shore had not been got around when Charles left, but I am in hopes to hear by the boat to-day that they are at the mill. I intended to have gone up by the next boat to P. Austin, but do not see how I can leave here, and shall not go unless I hear some bad news. I want to hear from you.

Yours, truly, F. S. AYRES.

N. B.—I have just received a line from Eb., saying that the schooner Flying Cloud is there loading with lath. The vessel from Chicago had not arrived.

F. S. AYRES.

154 EXHIBIT D.

Whereas, on the tenth day of November, A. D. 1853, Rollin C. Smith, Alfred A. Dwight, and William A. Howard made, executed, and delivered to Calvin P. Austin their bond and mortgage for the sum of $31,900, payable July 10, 1854, with interest at ten per cent. after maturity, and which mortgage appears of record in the office of the register of deeds for Sanilac county, Michigan, November 16th, 1853, in liber one of mortgages, on pages 267 & 268,

And whereas, the said Calvin P. Austin, on the first day of September last, A. D. 1860, executed an absolute assignment of the whole of said bond and mortgage to Mrs. Catherine A. Wiswall, of West Troy, New York, and for which she has this day paid said Austin therefor $25,438.22, being for $22,769.17 of principal, and the interest at ten per cent. thereon computed from August 4, 1859.

And whereas also, the said Austin has filed a bill of complaint in the circuit court for the county of Sanilac, in chancery, to foreclose said mortgage, and a dispute has arisen between said Austin and persons interested therein as to the amount due and unpaid on said bond and mortgage, and for the purpose of ascertaining the true amount so due and payable, and to procure a sale of said premises, said suit is to be prosecuted for such purposes, and if it shall be adjudged that there was only due and unpaid on the said bond and mortgage the sum of $22.769.17, and interest from August 4, 1859, then said assignment shall be delivered as hereinafter provided to said Mrs. Wiswall; but if it shall be adjudged that a larger sum was due on said 4th August, A. D. 1859, then any amount exceeding said sum, with the costs of the suit, shall remain and belong to said Austin, and shall be first paid to him, with interest thereon at ten per cent., and the costs of suit; and said suit shall for these

purposes be prosecuted for the benefit and security of said Austin and Mrs. Wiswall as aforesaid.

Now, therefore, for the mutual protection of Mrs. Wiswall and said Austin, for their respective interests on the said bond and mortgage, they have deposited said assignment by said Austin to Mrs. Wiswall in the hands of K. C. Barker, Esq., of Detroit, to be held by him for the benefit of both parties; and if it shall be adjudged by said court or otherwise that the amount paid by Mrs. Wiswall was the whole sum due and payable on said bond and mortgage, then the said assignment shall be considered absolute, and delivered to her as of this day, and the said Barker is
155 required to so deliver the same; and in case it shall be adjudged that there is a further sum due to said Austin, then upon the payment thereof to him by any officer of court or person authorized so to pay him, then said assignment shall be delivered to Mrs. Wiswall; but until the same shall be so adjudged as aforesaid, and said Austin paid as aforesaid, then the said assignment shall be held by said Barker and not delivered to either party.

Dated at Detroit, October 6, 1860.

C. P. AUSTIN,
By D. C. HOLBROOK.
CATHERINE A. WISWALL,
By her attorney, F. S. AYRES.

I acknowledge to have received the assignment above mentioned, and will hold and deliver the same according to the terms of above instrument.

October 6, 1860. K. C. BARKER.

156 EXHIBIT C.

Charles S. Nims, Circuit Court Commissioner, to Ayres, Learned & Wiswall.

Rec'd for record March 11, 1869, at 11 o'clock a. m.
RICHARD SMITH, *Register.*

This indenture, made the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and sixty-nine, between Charles S. Nims, a circuit court commissioner in and for the county of Sanilac, State of Michigan, residing in Lexington, in said county, party of the first part, and Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, composing the firm of Ayres, Learned & Wiswall, of Port Austin, in the county of Huron, State of Michigan, parties of the second part—

Witnesseth, whereas at a session of the circuit court for the county of Sanilac, in chancery sitting, at the court house, in the village of Lexington, on the sixth day of May, in the year one thousand eight hundred and sixty-eight, it was among other things ordered, adjudged, and decreed by said court, in a certain cause therein pending between Calvin P. Austin, complainant, and William A. Howard, Ellen J. Howard, Rollin C. Smith, Mary A. Smith, Alfred A. Dwight, Laura A. Dwight, The Detroit Locomo-

tive Works, William Warner, Thomas B. Rose, Roswell M. Reed, William L. Carpenter, and Simon Smith, defendants, that all and singular the mortgaged premises mentioned and set forth in the pleadings in said cause, or so much thereof as may be necessary to satisfy the amount due said complainant, for principal and interest and costs of suit, be sold by or under the direction of a circuit court commissioner of said court, at public auction, in the county where the said mortgaged premises or the greater part thereof are situated, the said commissioner first giving notice of the time and place of said sale, according to the course and practice of said court.

And whereas the said party of the first part to these presents, in pursuance of the order and decree of said court, did on the sixth day of January, in the year one thousand eight hundred and sixty-nine, sell at public auction, at the front door of the court house, in the village of Port Austin, in the county of Huron, the said mortgaged premises hereinafter particularly described, notice of the time and place of said sale having previously been given, as required by the order and decree aforesaid, at which sale the premises were struck off to the said parties of the second part to
157 these presents for the sum of nineteen thousand one hundred and fifty ($19,150) dollars, that being the highest sum bidden for the same, and they being the highest bidders.

Now, therefore, this indenture witnesseth, that the said Charles S. Nims, circuit court commissioner for the county of Sanilac, and State of Michigan, and party of the first part to these presents, in order to carry into effect the said sale so made as aforesaid, in pursuance of the said decree and order of said court, and also by virtue of the statute in such case made and provided, and in consideration of the premises and of the sum of nineteen thousand one hundred and fifty dollars paid by the said parties of the second part to these presents to the said party of the first part hereto—the receipt whereof is hereby confessed and acknowledged—hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, and sell, alien, release, convey and confirm unto the said parties of the second part, and to their heirs and assigns forever, all the following lands and premises, as follows: To the said Frederick S. Ayres an undivided one-half; to the said Charles G. Learned and Ebenezer Wiswall an undivided one-fourth each, to wit: All those certain pieces or parcels of land situated, lying and being in the county of Huron and State of Michigan, and described as follows, to wit: The south part of southeast fractional quarter of section twenty-two (22), eighty acres; the southwest quarter and southwest quarter of northeast quarter, and southeast quarter of northwest quarter, of section twenty-six (26), two hundred and forty acres; the southeast quarter and northwest quarter and northwest quarter of southwest quarter, and west half of northeast quarter, and east half of southwest quarter, of section twenty-seven (27), five hundred and twenty acres; the west half of southeast quarter and south half of northwest quarter, and west half of southwest quarter, and southeast quarter of southwest quarter, of section twenty-eight (28), two hundred and eighty acres (280); west

half of southwest quarter, and northwest quarter of northeast quarter, and southeast quarter of northeast quarter, and east half of northwest fractional quarter, of section twenty-nine (29,) three hundred and eighty-two acres; the north half of southwest quarter and northeast quarter of southeast quarter of section thirty (30), one hundred and twenty acres; the southeast quarter and east half of northeast quarter of section thirty-one (31), two hundred and forty acres; the northeast quarter and west half of southeast quarter, and east half of southwest quarter, and east half of northwest quarter, and southeast quarter of southeast quarter, of section thirty-
158 two (32), four hundred and forty acres; the east half of northwest quarter, and west half of northeast,quarter, and south half of southeast quarter, and south half of southwest quarter, and northeast quarter of northeast quarter, and northwest quarter of southeast quarter, and northwest quarter of northwest quarter of section thirty-three (33), four hundred and eighty acres; the south half of southwest quarter, and east half of northwest quarter, and northeast quarter of southeast quarter of section thirty-four (34), two hundred acres; the southeast quarter of southeast quarter of section thirty-six (36), forty acres; all the forementioned lands being in township number nineteen (19) north, of range number thirteen (13) east.

Also, the east part of northeast fractional quarter, eighty and 38-100 acres, and northeast quarter of southeaet quarter, forty acres of section No. one (1); the northeast fractional part of northwest fractional part, forty-five and 60-100 acres; the west fractional part of northwest fractional quarter, eighty-five and 35-100 acres; north part of northeast fractional quarter, ninety-one and 95-100 acres; the southeast quarter of southwest quarter and west half of southwest quarter, southwest quarter of southeast quarter of section three (3), three hundred and eighty-two and 90-100 acres; the northeast fractional quarter of the northeast fractional quarter, forty-four and 79-100 acres; and south half of northeast fractional quarter, eighty acres; and northwest fractional quarter, one hundred and sixty-eight and 73-100 acres; and south half of southwest quarter, eighty acres; and northwest part of northeast fractional qvarter, forty-four and 62-100 acres of section four; the east fractional part of northeast fractional quarter, eighty-four and 29-100 acres; and east half of southeast quarter, eighty acres; and northwest part of northwest fractional quarter, forty acres; and northwest part of northeast fractional quarter, forty acres of section five (5); the southwest part of southwest fractional quarter, forty acres; and east part of northwest fractional quarter, and east half of southwest quarter, one hundred and sixty acres; and west half of southeast quarter, eighty acres of section six (6); the northwest fractional quarter, one hundred and sixty-four and 19-100 acres; and southwest fractional quarter, one hundred and sixty-four and 13-100 acres; and west half of northeast quarter, eighty acres; and west half of southeast quarter, eighty acres of section seven (7); the east half of northeast quarter, eighty acres of section eight (8); the southwest quarter of southeast quarter, and east half of southeast quarter and southwest

quarter, and northwest quarter of southeast quarter, and
159 northeast quarter of section nine (9), four hundred and eighty acres; the northwest quarter of southwest quarter and west half of northwest quarter, and east half of northwest quarter, and south half of southwest quarter of section ten (10), two hundred and eighty acres; the west half of southwest quarter of section thirteen (13), eighty acres; the east half of southeast quarter of section fourteen (14), eighty acres; the northwest quarter and southwest quarter of southwest quarter, and northeast quarter of southwest quarter of section fifteen (15), two hundred and forty acres; the west half of northeast quarter and northwest quarter of northeast quarter, and north part of southwest fractional quarter, and northwest fractional quarter of section eighteen (18), three hundred and sixty-eight and 16-100 acres; the northwest quarter of northwest quarter of section twenty-three (23), forty acres; the northwest quarter of northwest quarter of section twenty-eight (28), forty acres; the northeast quarter of northeast quarter of section twenty-nine (29), forty acres; and east half of southeast quarter of section thirty-six (36), eighty acres; the northeast fractional quarter of section six, one hundred and forty-seven and 40-100 acres; the southeast quarter of section four (4), one hundred and sixty acres; the northwest quarter of section nine (9), one hundred and sixty acres; the southeast quarter of southeast quarter of section seventeen (17), forty acres; the northeast quarter of northeast quarter of section twenty (20), forty acres; and southeast quarter of southeast quarter of section twenty, forty acres; all in township number eighteen north, of range thirteen east.

Also, the west fractional part of northwest quarter of section six (6), seventy-six and 66-100 acres; the west part of southwest fractional quarter, and southwest quarter of northeast quarter, and north half of northeast quarter, and east half of southwest fractional quarter, and southeast quarter of northwest fractional quarter of section nineteen (19), three hundred and nine and 44-100 acres; the northeast quarter of northwest fractional quarter of section thirty (30), forty acres; all in township number eighteen (18) north, of range fourteen (14) east.

Also, the east part of northeast fractional quarter of section number one (1), and northeast quarter of northeast quarter of section twelve (12), all in township number seventeen (17) north, of range thirteen (13) east, one hundred and twenty and 83-100 acres.

Also, the west part of southwest fractional quarter of section six (6), eighty-two and 16-100 acres; the north part of northwest fractional quarter of section seven (7), eighty-one and 78-100 acres; the north half of northeast quarter, and north half of north-
160 west quarter of section seventeen (17), one hundred and sixty acres; all in township number seventeen (17) north, of range fourteen (14) east.

Also the southwest quarter of southwest quarter of section thirty-one (31), in township number nineteen north, of range number fourteen (14) east; also the west half of the southeast quarter of section twenty-five (25), and lots number two (2) and number three (3) of

fractional section twenty-five (25), and northwest quarter of northwest quarter of section thirty-six, all in township number nineteen (19) north, of range twelve (12) east, and containing two hundred and seventy-four and $\frac{26}{100}$ acres.

Also the east half of southwest quarter and southwest quarter of southeast quarter of section one (1), one hundred and twenty acres; and east half of southeast quarter and northwest quarter of northeast quarter of section twelve (12), one hundred and twenty acres; the northeast quarter of northeast quarter of section thirteen (13), forty acres; and south half of southeast quarter of section twenty-five (25), eighty acres; and north half of northeast quarter of section thirty-six (36), eighty acres, all in township number eighteen (18) north, of range number twelve (12) east.

Together with all and singular the rights, titles, members, privileges, hereditaments, and appurtenances to the same belonging or in anywise appertaining. To have and to hold the said premises above described and hereby intended to be granted and conveyed unto the said parties of the second part, their heirs and assigns, to their and their only proper use, benefit, and behoof, forever.

In witness whereof, the said party of the first part, circuit court commissioner as aforesaid, has hereunto set his hand and seal, the day and year first above written.

CHAS. S. NIMS,
Circuit Court Commissioner, Sanilac County, Michigan.

Signed, sealed, and delivered in presence of—
WATSON BEACH.
C. H. GALLUP.

[Rev. stamp, $19.55. C. S. N. 27 Jan'y, 1869.]

STATE OF MICHIGAN, } ss:
County of Sanilac, }

On this 27th day of January, A. D. 1869, before the under-
161 signed, personally appeared Charles S. Nims, circuit court commissioner for the county of Sanilac, in said State, known by me to be the person described in and who executed the above indenture, and acknowledged that he executed the same freely for the uses and purposes therein mentioned.

WATSON BEACH,
Notary Public, Sanilac County, Michigan.

STATE OF MICHIGAN, }
County of Huron, }

I, Carl Heisterman, register of deeds in and for the county of Huron, do hereby certify that the foregoing is a correct transcript, compared by me from the original record, of a deed made by Charles S. Nims, circuit court commissioner for Sanilac county, to Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, and dated January 27th, 1869, now remaining in my office, and of record therein, and of the whole of such original record.

In testimony whereof, I have hereunto subscribed my name and

official character, at Bad Axe, in said county, this 15th day of August, A. D. 1879.

[SEAL.] CARL HEISTERMAN,
Register of Deeds.

162 EXHIBIT F.

Frederick S. Ayres et al. to Catherine A. Wiswall.

Received for record March 11, 1869, at 11 o'clock a. m.
RICHARD SMITH, *Register.*

Know all men by these presents: That Frederick S. Ayres, Charles G. Learned, of Port Austin, in the State of Michigan, and Ebenezer Wiswall, of the county of Albany and State of New York, in consideration of the sum of forty thousand one hundred and five & $\frac{43}{100}$ dollars in hand paid by Catherine A. Wiswall, of West Troy, New York, have bargained and sold, and do hereby grant, bargain, sell, and convey unto the said Catherine A. Wiswall and her heirs and assigns forever the following premises, situate in the county of Huron and State of Michigan, and known as "The Port Austin Mill Property," and being the same property described in a deed of conveyance this day made by Charles S. Nims, circuit court commissioner of Sanilac county, State of Michigan, to said Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, to which deed reference is here made for a more particular description, excepting therefrom the following pieces or parcels of land, to wit: The southeast quarter of the northwest quarter of section six; the north half of the northwest quarter of section five; the southwest quarter of the northwest quarter of section seven; the south half of the southwest quarter and the south half of the northwest quarter of section four, in town eighteen north, of range thirteen east; the south half of southwest quarter, north half of the northwest quarter, north half of the northeast quarter, southwest quarter of the northeast quarter, section thirty-three; northwest quarter of the southwest quarter, northwest quarter of section thirty-four; west half of southwest quarter of section twenty-six; southeast quarter, east half of southwest quarter of section twenty-seven; west half of the southeast quarter, southeast quarter of the southwest quarter of section twenty-eight, town nineteen north, of range thirteen east; the southwest quarter of the southeast quarter of section one; northeast quarter of southeast quarter of section twelve, town eighteen north, of range twelve east. To have and to hold said premises, with the appurtenances, unto the said Catherine A. Wiswall and her heirs and assigns forever.

163 And the said Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, for themselves and their executors, administrators, and heirs, do hereby covenant with the said Catherine A. Wiswall and her heirs and assigns that they are lawfully seized of the premises aforesaid, that the premises are free and clear from all incumbrances whatever, and that they will forever warrant and defend the same, with the appurtenances, unto the said Catherine

A. Wiswall and her heirs and assigns against the lawful claims of all persons whomsoever.

And be it further known that Nancy Ayres and Maria Learned, wives of the above-named grantor-, in consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby remise, release, and forever quit-claim to said grantee and her heirs and assigns all their right, title, and interest in and to the above-granted premises, either by way of dower or otherwise.

Provided always, and these presents are upon this condition, that whereas the said Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall are indebted to the said Catherine A. Wiswall for the purchase money of the foregoing premises in the sum of forty thousand one hundred and five & $\frac{33}{100}$ dollars, evidenced by their bond of even date herewith, payable two years from date, with interest thereon at the rate of seven per cent. per annum, payable semi-annually—

Now, if the said Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall shall well and truly pay said bond, then these presents shall become void; otherwise to remain in full force and virtue.

In testimony whereof, we, the said Frederick S. Ayres, Charles G. Learned, Ebenezer Wiswall, Nancy Ayres and Maria Learned, have hereunto set our hands and seals, this 27th day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

F. S. AYRES. [SEAL.]
EBEN. WISWALL. [SEAL.]
NANCY AYRES. [SEAL.]
CHAS. G. LEARNED. [SEAL.]
MARIA LEARNED. [SEAL.]

[Rev. stamps, $40 50-100. F. S. A. C. G. L. E. W. Mar. 11, 1869.]

Signed, sealed, acknowledged, and delivered in the presence of—
G. O. SELKIRK.
EBEN. R. AYRES.

164 Witnesses as to C. G. Learned and Maria Learned—
G. H. VAN WOERT.
J. S. AYRES.

THE STATE OF OHIO, } ss:
Erie County, }

Be it remembered, that on this 27th day of January, A. D. 1869, before me, George O. Selkirk, clerk of the court of common pleas, within and for said county, personally appeared the above named Frederick S. Ayres, Nancy Ayres, and Ebenezer Wiswall, and acknowledged the signing and sealing of the within and foregoing mortgage to be their voluntary act and deed; and the said Nancy Ayres, wife of said Frederick S. Ayres, being at the same time examined by me separate and apart from her husband, and the contents of said mortgage made known to her by me, then and there

declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith; and I further certify that the foregoing deed is executed and acknowledged according to the laws of the State of Ohio, and that I am authorized to take such acknowledgement.

[SEAL.] GEORGE O. SELKIRK,
Clerk of the Court of Common Pleas of Erie County, Ohio.

STATE OF MICHIGAN, } *ss*:
County of Huron, }

Be it remembered, that on this 11th day of March, A. D. 1869, befyre me, Edmond Cole, a notary public in and for said county, personally appeared the above named Charles G. Learned and Maria Learned, and acknowledged the signing and sealing of the within and foregoing mortgage to be their voluntary act and deed; and the said Maria Learned, wife of the said Charles G. Learned, being at the same time examined by me, separate and apart from her husband, and the contents of said mortgage made known to her by me, then and there declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith.

EDMOND COLE,
Notary Public.

165 STATE OF MICHIGAN, *County of Huron.*

I, Carl Heisterman, register of deeds in and for the county of Huron, do hereby tertify that the foregoing is a correct transcript, compared by me from the original record, of a mortgage made by Frederick S. Ayres and Charles G. Learned, of Port Austin, in the State of Michigan, and Ebenezer Wiswall, of West Troy, New York, and dated January 27th, 1869, now remaining in my office and of record therein, and of the whole of such original record.

In testimony whereof I have hereunto subscribed my name and official character, at Bad Axe, in said county, this 15th day of August, A. D. 1879.

[SEAL.] CARL HEISTERMAN,
Register of Deeds.

166 EXHIBIT H.

Catharine A. Wiswall to Charles E. Wiswall et al.

Received for record June 2, 1874, at 10½ o'clock a. m.
RICHARD SMITH, *Register.*

Know all men by these presents, that I, Catharine A. Wiswall, of the village of West Troy, Albany county, N. Y., of the first part, in consideration of the sum of one dollar, to me in hand paid by Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do grant, bargain,

sell, assign, transfer, and set over unto the said parties of the second part, a certain indenture of mortgage, bearing date the 27th day of January, in the year one thousand eight hundred and sixty-nine, made by Frederick S. Ayres, Nancy Ayres, his wife, Charles G. Learned, and Maria Learned, his wife, and Ebenezer Wiswall, and which said mortgage was recorded in the register's office of Huron county, Mich., on the 11th day of March, in the year 1869, in Book of Mortgages No. C, at page 240, &c., together with the bond or obligation therein described, and the money due or to grow due thereon, with the interest:

To have and to hold the same unto the said parties of the second part for their use and benefit, subject only to the proviso in the said indenture of mortgage mentioned. And I do hereby make, constitute, and appoint the said parties of the second part my true and lawful attorneys, irrevocable in my name or otherwise, but at their own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the said money and interest; and, in case of payment, to discharge the same, as fully as I might or could do if these presents were not made.

And I do hereby covenant to and with the said parties of the second part that there is now due and owing upon said bond and mortgage the sum of ——— dollars and ——— cents, with interest from the ——— day of ———, 18—, and that I have a good right to sell and assign the same as aforesaid.

In witness whereof, I have hereunto set my hand and seal,
167 this twenty-fifth day of February, in the year one thousand eight hundred and seventy-four.

her
CATHARINE x WISWALL.
mark.

Sealed and delivered in the presence of—
GEO. Y. LEARNED.
GEORGE L. POLLOCK.

STATE OF NEW YORK, } ss:
Rensellaer County, }

On the twenty-fifth day of February, one thousand eight hundred and seventy-four, before me, a commissioner for the State of Michigan, appeared Catharine A. Wiswall, to me well known to be the person described in and who executed the within assignment, and acknowledged that she executed the same.

A. G. HASLTED, [SEAL.]
Commissioner for the State of Michigan, Troy, N. Y.

STATE OF MICHIGAN, } ss:
County of Huron, }

I, Carl Heisterman, register of deeds in and for the county of Huron, do hereby certify that the foregoing is a correct transcript, compared by me from the original record, of an assignment of a mortgage, dated June 2d, 1874, by Catharine A. Wiswall to Charles

E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, of a mortgage made by Frederick S. Ayres and Charles G. Learned, of Port Austin, in the State of Michigan, and Ebenezer Wiswall, of West Troy, New York, to Catharine A. Wiswall, of West Troy, New York, and dated January 27th, 1869, now remaining in my office, and of record therein, and of the whole of such original record.

In testimony whereof, I have hereunto subscribed my name and official character, at Bad Axe, in said county, this 15th day of August, A. D. 1879.

[SEAL.] CARL HEISTERMAN,
Register of Deeds.

168 EXHIBIT I.

Frederick S. Ayres & James S. Ayres.

Received for record March 8, 1870, at 10 o'clock, a. m.
RICHARD SMITH, *Register.*

This agreement, made this 23d day of August, A. D. 1867, between Federick S. Ayres, of Port Austin, Huron county, and State of Michigan, of the first part, and James S. Ayres, of the same place, of second part—

Witnesseth, that the said party of the first part, in consideration of the sum of one dollar, to him in hand paid, by the said party of the second part, the receipt of which is hereby acknowledged and confessed, and of the agreements and covenants hereinafter expressed and contained, hereby sells, assigns and transfers to the said party of the second part, one-fifth (1-5) of the partnership interest of the said party of the first part, of, in and to the real and personal property and business of the firm known as Ayres, Learned & Wiswall, doing business at Port Austin aforesaid; and the said party of the first part further agrees, to give to the said party of the second part, within three months of the date of these presents, a quit-claim deed for one undivided one-fifth (1-5) of the undivided one half (1-2) of said party of the first part's interest and title of, in, and to all the real estate belonging to and owned by the said firm of Ayres, Learned & Wiswall.

And the said party of the second part, in consideration hereof, agrees to give his personal attention and supervision exclusively to the business carried on by the said firm of Ayres, Learned & Wiswall. And the said party of the second part further agrees not to sell, assign, or transfer his said interest in the partnership property aforesaid during the lifetime of the said party of the first part, without the consent of the said party of the first part expressed in writing. And the said party of the second part further agrees to pay to the said party of the first part, upon the delivery of the deed aforesaid, one-fifth (1-5) of the undivided indebtedness of the said party of the first part to the said firm of Ayres, Learned & Wiswall, at the date of these presents, as follows, to wit: to be paid to the said party of the first part out of the interests and profits of the real and

personal property conveyed in pursuance of this agreement to the said James S. Ayres.

In witness whereof, the said parties hereto have set their
169 hands and seals the day and year first herein written.

F. S. AYRES. [SEAL.]
J. S. AYRES. [SEAL.]

Witnessed by—
W. W. JOHNSON,
G. H. VAN WOERT.

[Revenue Stamps.]

HURON COUNTY, } ss:
State of Michigan, }

Before me, a justice of the peace in said county of Huron, personally appeared Frederick S. Ayres and James S. Ayres, who severally acknowledged that they signed and executed the within contract for the uses and purposes therein expressed, and that they do not wish to retract the same, the said Frederick S. Ayres and James S. Ayres being personally known to me as the identical persons who executed the within contract.

EDMOND COLE,
Justice of the Peace.

Port Austin, Mich., March 8th, A. D. 1870.

STATE OF MICHIGAN, } ss:
County of Huron, }

I, Carl Heisterman, register of deeds in and for the county of Huron, do hereby certify that the foregoing is a correct transcript, compared by me form the original record, of a contract made by Frederick S. Ayres and James S. Ayres, of Port Austin, in the State of Michigan, and dated August 23d, 1867, now remaining in my office, and of record therein, and of the whole of such original record.

In testimony whereof I have hereunto subscribed my name and official character, at Bad Axe, in said county, this 15th day of August, A. D. 1879.

[SEAL.] CARL HEISTERMAN.
Register of Deeds.

170 EXHIBIT J.

Ebenezer Wiswall & Frederick S. Ayres.

Received for record, Feb. 14, 1872, at 3 o'clock p. m.
RICHARD SMITH, *Register.*

This contract, made this 31st day of October, A. D. 1871, between Ebenezer Wiswall, of West Troy, Albany county, New York, of the first part, and Frederick S. Ayres, of Port Austin, in the State of Michigan, of the second part:

Whereas the parties hereto and Charles G. Learned, of Port Austin, State of Michigan, have been for a number of years and are

now partners in trade, under the name of Ayres, Learned & Wiswall, of Port Austin aforesaid, and as such own a large amount and quantity of real and personal estate in the State of Michigan and personal property in the State of Ohio, and notes, bonds, mortgages, and accounts against sundry persons and firms.

And whereas, on the books of said firm is an account against said party of the first part for $14,081.30, and an account against Charles E. Wiswall which is included in said amount, and againsi which is an offset of $348.47, leaving $13,732.83 balance.

And whereas the said Ebenezer Wiswall has agreed to sell, and he doth hereby sell, to the said Frederick S. Ayres, the party of the second part hereto, all his, the said party of the first part, interest in and to all the said real and personal estate, rights, and credits, in which he has any interest as one of the partners of said firm, be the same more or less, upon the terms and conditions following; that is to say, for the sum of $31,449.96, payable as follows: cash this day, $7,500, the sum of $7,500 and interest thereon at seven per cent., on the first day of December next, the sum of $6,238.93, with the interest thereon at seven per cent., nine months from this day, the sum of five thousand one hundred and five dollars and fifty-one cents, and interest twelve months from this day, and the like sum with interest eighteen months from this day.

And the said party of the second part assumes and is to arrange and settle the said sum of 13,732.83, the balance of said accounts against the party of the first part and Charles E. Wiswall; and the said party of the second part also agrees to pay, satisfy, and discharge and save harmless the party of the first part from all the debts
171 and liabilities of said firm, for which the party of the first part is or shall be liable, as such partner, in any way, and for such payment and indemnity the party of second part has made, executed, and delivered to party of the first part his bond of this date.

And for the payment of the $7,500 and interest, payable on the first of December next, and the sum of $5,105.51 at twelve and eighteen months with interest, he has given his promissory notes to party of the first part; and for the paymeet of the $6,238.93 principal he has delivered and indorsed to party of first part the note of E. R. Ayres, dated October 28, 1871, for $6,238.93 without interest, and which note is also indorsed by Messrs. Moore, Foote & Co., and has made and delivered to party of first part his note for $327.55, at nine months, being the interest on $6,238.93 for nine months.

And the said party of the first part hereby agrees, that upon payment of said sum of $31,449.96, and as aforesaid, and upon the settlement and discharge of said sum of $13,732.83, he will make, execute, acknwledge, and deliver, his wife joining therein, a good and sufficient deed, conveying to the party of the second part, and his heirs and assigns, all his interest in the said real estate; such deed, however, shall be subject to all liens and incumbrances thereon, and covenants only against the acts of the party of the first part for his personal benefit.

And in the case of the failure of the party of the second part to pay

said purchase price, or any part thereof, at the time and times above mentioned, and in case such default shall continue for the space of three months, then, after the expiration of said three months, the party of the first part may take possession of said property, and shall be reinstated therein as of his own property; and any payment which shall have been made shall be declared forfeited, as damages for non-performance on the part of second party; or the said party of the first part may proceed and collect the balance of said purchase money, either by suit on said notes or by foreclosure of this contract, for such unpaid purchase money.

It being also understood that the above sale is made also subject to a mortgage given by the parties hereto, and said Charles G. Learned to the wife of party of first part for $40,105.03 and interest, which is to be paid by the said party of second part and said Learned, and as between the parties hereto the same is al-
172 lowed and taken as part of the purchase price of said premises.

EBENEZER WISWALL. [L. S.]
F. S. AYRES. [L. S.]

In presence of—
J. W. MASON.
D. C. HOLBROOK.

STATE OF MICHIGAN, *County of Wayne.*

On this 31st day of October, 1871, personally appeared before me the above-named Ebenezer Wiswall and Frederick S. Ayres, and they severally acknowledged that they executed the same as their free act and deed.

B. T. PRENTIS,
Notary Public, Wayne County, Michigan.

STATE OF MICHIGAN, } ss:
County of Huron, }

I, Carl Heisterman, register of deeds in and for the county of Huron, do hereby certify that the foregoing is a correct transcript, compared by me from the original record, of a contract made by Ebenezer Wiswall, of West Troy, New York, and Frederick S. Ayres, of Port Austin, Michigan, and dated October 31st, 1871, now remaining in my office, and of record therein, and of the whole of such original record.

In testimony whereof I have hereunto subscribed my name and official character, at Bad Axe, in said county, this 15th day of August, A. D. 1879.

[SEAL.] CARL HEISTERMAN,
Register of Deeds.

173 EXHIBIT K.

This contract, made the 20th day of October, A. D. 1874, between Jonas R. Learned and Charles G. Learned, of Port Austin, Michigan, of the first part, and Ebenezer R. Ayres, of Sandusky, Ohio, of the second part.

Whereas Jonas R. Learned and Charles G. Learned are now owners of a quarter interest of the real and personal property belonging to the firm of Ayres, Learned & Co., doing business at Port Austin, Michigan; and whereas the said Jonas R. Learned and Charles G. Learned have agreed to sell, and do hereby sell, to the said Ebenezer R. Ayres, the party of second part hereto, all their, the said party of the first part, interest in and to all the said real and personal estate, rights, and credits in which they have any interests as owners of said one-quarter of the real and personal property of the firm of Ayres, Learned & Co., be the same more or less, except in 30,000 dollars worth herein taken as part payment, upon terms and conditions following: That is to say, for the sum of ($40,000) forty thousand dollars, payable as follows: Certain real and personal property in Port Austin, taken at a cash valuation of thirty thousand dollars ($30,000), and the notes of said E. R. Ayres, (endorsed by F. S. Ayres and J. S. Ares, or in their firm name which may be adopted by them and E. R. Ayres, in the conduct of their business at Pt. Austin, M.,) for five thousand dollars each, dated October 20th, 1874, with interest at seven per cent., payable annually, in five and six years after date, at Pt. Austin, Michigan.

Upon the settlement and payment of the said sum of forty thousand dollars in the manner hereinbefore stated, they, the said party of the first part, will make, execute, and acknowledge, and deliver, their wives joining therein, a good and sufficient deed, conveying to the party of the second part, and his heirs and assigns, all their interest in the said real estate; such deed, however, shall be subject to a mortgage given by Eben Wiswall, Frederick S. Ayres, and Charles G. Learned, to the wife of said Eben Wiswall for $40,105.03 and interest, which is to be paid by the said party of the second part and said F. S. Ayres and J. S. Ayres; and as between the said parties hereto, the same is allowed and taken as part of the purchase price of the said premises.

Said E. R. Ayres agrees to pay the proportion of said J.
174 R. Learned and C. G. Learned's indebtedness of Ayres, Learned & Co., as now appears by the books of said Ayres, Learned & Co.

(Signed) CHARLES G. LEARNED. [L. S.]
JONAS R. LEARNED. [L. S.]
EBENEZER R. AYRES. [L. S.]

In presence of—
R. WINSOR.
J. S. AYRES.

STATE OF MICHIGAN, }
County of Huron, } *ss*:

On this 20th day of October, 1874, personally appeared before me the above named Jonas R. Learned, Chas. G. Learned, and Ebenezer R. Ayres, and they severally acknowledged that they executed the same as their free act and deed.

RICHARD WINSOR, *Notary Public.*

STATE OF MICHIGAN, } ss:
County of Huron, }

I, Carl Heisterman, register of deeds in and for the county of Huron, do hereby certify that the foregoing is a correct transcript, compared by me from the original record, of a contract made by Jonas R. Learned and Charles G. Learned, of Port Austin, in the State of Michigan, and Ebenezer R. Ayres, of Sandusky, in the State of Ohio, and dated October 20th, 1874, now remaining in my office, and of record therein, and of the whole of such original record.

In testimony whereof I have hereunto subscribed my name and official character, at Bad Axe, in said county, this 15th day of August, A. D. 1879.

[SEAL.] CARL HEISTERMAN,
Register of Deeds.

175 EXHIBIT L.

[Certified transcript of the case of Calvin P. Austin, complainant, against William A. Howard *et al.* In the circuit court for the county of Sanilac. In chancery.]

Withdrawn by consent of counsel, and afterwards offered again as Exhibit "A 4."

176 EXHIBIT N.

PORT AUSTIN, MICH., *Jan.* 1*st*, 1876.

WM. MCA. WISWALL, Esq.

DEAR SIR: Yours of Dec. 24th duly received and noted.

Will you send us a statement of the amount of interest that will be due on the mortgage January 27th, 1876, and we will try and raise the money to extinguish it. The following payments have been made by us on the mortgage:

February 27th, 1872	$8,000 00
June 14th, 1873	10,000 00
	$18,000 00

Mortgage dated Jan. 27th, '69, for $40,105, with 7 per cent. interest semi-annually.

Yours truly, AYRES & CO.

177 EXHIBIT O.

SANDUSKY, *Dec.* 28, 1868.

E. WISWALL.

I have just returned from Detroit. T. S. Donahue has entered a complaint against C. G. Learned of defrauding the Government of internal revenue by giving due-bills on the store. I saw Mr. Holbrook in relation to the matter, and Mr. Holbrook is of the opinion that the due-bills or orders on the store is not an infringement on

the internal revenue law; at all events, he says there is no intention to defraud the Government. I left the matter in his hands.

Mr. Holbrook says the sale of the property under the mortgage will not lessen your security. This opinion accords with my judgment. Mr. Holbrook also says there is no occasion for you or me to be there. The sale is to take place on the 6th of Jan'y, unless it is further postponed. It will be important for you to be in Detroit when the papers are executed, and that may be a time convenient to us all. We shall be obliged to get a discount to pay the notes falling due on 17 & 30 of January, at the Bank of W. Troy. I do not think money was ever closer in the West. Our trade has all fallen off; there is no lumber being shipped from Sandusky. I think there is no doubt we shall have a good spring trade. This country is full of produce and property that will bring money. Make arrangements with the bank as early as you can to carry along the two notes named, and let me know the result. I sent up yesterday 5 teams to Port Austin to haul logs; they have had good hauling at the Port for some time. I cannot tell at present when I can go to Port Austin. I shall watch the pot very close, and make all the good sales of lumber I can. Let me hear from you. All well.

Yours truly, F. S. AYRES.

Holbrook says that Whispering Smith does not know anything about the case he is prosecuting against the Port Austin property.

F. S. A.

178 EXHIBIT P.

[Stamp.]

$3,000 SANDUSKY, OHIO, *March 8th*, 1870.

Three months after date we promise to pay to the order of Ayres, Learned & Wiswall three thousand dollars, at the National Bank of West Troy, N. Y. Value received.

AYRES & LEARNED.

Due June 11th.

Endorsed: "Ayres, Learned & Wiswall, Port Austin, Michigan."

Stamped upon the face of this note was: "National Bank—paid—West Troy."

Avails of this note credited to E. Wiswall, in acc't, March 15th, 1870, for the purpose of making his acc't good for $3,000 note of his maturing March 17, 1870. Done by direction of Ayres, Learned & Wiswall. See their letter of March 8th, 1870.

[Internal revenue stamps, $1.50.]

The above is a copy of the original as compared by me, this 6th day of September, 1879.

GEORGE C. GREEN,

Circuit Court Commissioner, Huron County, Michigan.

179 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL *et al.* Complainants,
vs.
FREDERICK S. AYRES *et al.* Defendants.

To the circuit court for the county of Huron. In chancery:

The following proofs were taken before me on the 22d and 24th days of October, A. D. 1879, on part of the complainants in this cause.

Richard Winsor, Esq., appeared for complainants; John Atkinson, Esq., appeared for defendants.

The notice annexed hereto, marked "A," was filed by complainants' solicitor.

JAS. A. RANDALL,
Circuit Court Commissioner, Wayne County, Michigan.

Dated, Detroit, November 12, 1879.

180 *Testimony of Ebenezer Wiswall.*

EBENEZER WISWALL, a witness produced on part of the complainants, being duly sworn, deposes and says:

By Mr. WINSOR:

Q. Where do you reside?

A. In West Troy, Albany county, New York.

Q. Were you a member of the firm of Ayres, Learned & Wiswall?

A. I was, sir.

Q. Do you recollect the mortgage upon the Port Austin property of your firm, known as the Calvin P. Austin mortgage?

A. Yes, sir.

Q. Do you recollect the purchase of that mortgage?

A. I do; I do not know as I ever saw that mortgage; I do not recollect.

Q. Catherine A. Wiswall, for whom it was purchased, was your wife?

A. Yes, sir.

Q. Who did the business in purchasing that mortgage?

A. Mr. Ayres did the principal part of it.

Q. Which Mr. Ayres?

A. F. S. Ayres. I, in two or three instances, went to see Mr. Austin; he always referred me to Mr. Holbrook. Mr. Ayres was out here, and he did the principal part of the business.

Q. Was Frederick S. Ayres at that time a member of the firm of Ayres, Learned & Wiswall?

A. He was, sir.

Q. Do you know if the mortgage was assigned to Catherine A. Wiswall?

A. Yes, sir; I understood so. I have a letter, I think, from Mr. Ayres saying he had got the assignment.

Q. Then your knowledge of that fact is from Frederick S. Ayres?

A. Yes, sir.

Q. Who furnished him the money with which that mortgage was purchased?

A. I did.

Q. Can you now state what sum you furnished him at that time?

A. I see by bank book that I drew $22,000 and brought it here for the purpose of getting an assignment of that mortgage.

Q. Was there an entry of the sum of money that you drew
181 made upon your bank book, the sum of money that you drew for that purpose from the bank?

A. Yes, sir; I think so.

Q. What is the sum entered upon your bank book, charged to you?

A. $22,000.

Q. Do you recollect in what manner you got the $22,000 from the bank, in what shape it was?

A. It was in drafts, I think.

Q. Do you recollect what you did with those drafts?

A. I think I gave them to Mr. Ayres; I do not know whether I did all or not; I think I did.

Q. It was to Frederick S. Ayres?

A. Yes, sir. I think they were left to get that assignment.

Q. That is, left with him to do that business?

A. I think so, sir.

Q. Was that assignment ever delivered to you for Catherine A. Wiswall?

A. I think not.

Q. Did Mr. Ayres inform you what became of it, what was done with it?

A. He informed me that he had it, if I recollect right, by letter.

Q. Were there ever any payments made to you upon that mortgage?

A. I think there were, sir; yes, sir.

Q. I mean on the old mortgage—the Calvin P. Austin mortgage?

A. I think there was.

Q. I now refer to the Calvin P. Austin mortgage you say you did not get the assignment of, not the new mortgage which was made in 1869?

A. I think there were payments made on it, if I recollect right.

Q. Were there any payments made to you upon the Catherine A. Wiswall mortgage?

A. Not to my recollection.

Q. What payments do you refer to being made to you?

A. One of $8,000 and one of $10,000, I think.

Q. There was but one payment of $8,000 and one of $10,000 made to you?

A. Those are all I have any knowledge of.

Q. Now, were not those payments made on the new mortgage which was given to Mrs. Wiswall?

182 A. I wouldn't be positive. There were two payments made to me, and I wouldn't be positive which they were on.

Q. Will you look at Exhibit "B," and see if those receipts are receipts for the payments you refer to?

A. Yes, sir; those are the only two payments I received.

Q. You did the business in regard to the Catherine A. Wiswall mortgage while your wife was alive?

A. I did, sir; I think it was down until about a month before she died, I think.

Q. Were you present when the assignment was made and executed?

A. I was, sir.

Q. Where does George Y. Learned live?

A. Pittsfield, Massachusetts.

Q. And George L. Pollock?

A. The same place.

Q. Will you look at this paper writing, Mr. Wiswall?

(Paper handed witness.)

A. At the signatures?

Q. Yes.

A. I saw them make them, sir.

Q. State what that is?

A. That is George Y. Learned and George L. Pollock.

Q. Who executed that?

A. Who made the mark?

Q. Yes.

A. My wife; I was present, sir.

The paper identified by the witness is offered in evidence, and is marked Exhibit "Q."

The proof of the execution of the paper is objected to, on the ground that it should be by the subscribing witness.

Q. Were you present when the acknowledgment of the execution of the instrument was taken?

A. I was, sir; I brought the commissioner and was present.

Q. Were there ever any payments made to you upon this Catherine A. Wiswall mortgage, except the $8,000 and $10,000?

A. No, sir.

Q. Were there ever any payments made to Mrs. Wiswall?

A. Not any; not to my knowledge.

Q. Was the original bond and mortgage in your possession after it was executed?

A. To Catherine A. Wiswall?

Q. To Catherine A. Wiswall.

183 A. It was, sir, I think.

Q. Do you recollect the facts in regard to the execution of that mortgage?

A. Do I?

Q. When it was executed?

A. It was execute on the part of Mr. and Mrs. Ayres at Sandusky.

Q. Any else execute it there?

A. I think not, sir.

Q. Do you recollect where it was executed by yourself?

A. Well, I think that must have been at Sandusky. I have no recollection.

Q. Do you recollect where the mortgage was made?

A. I am very sure it was made at Sandusky. I came out about the first of the month, and stopped at Sandusky only a day. I think then I went to Port Austin, and on my way back again I stopped there, and that is the time the mortgage was executed.

Q. Do you recollect how long you were at Sankusky on your return when the mortgage was executed?

A. It is the only place I stopped; I left Port Austin the 25th, and I arrived home the second of the next month; I made no stop in Detroit.

By Mr. ATKINSON:

Q. What month was that, August?

A. January. I left Port Austin January 25th, and arrived at West Troy the second day of February.

By Mr. WINSOR:

Q. Which route did you go from Port Austin to Sandusky?

A. Came down by the usual way.

Q. That is, down the shore through Lexington?

A. Yes, Toledo and Sandusky, and from there directly home to West Troy, and arrived at West Troy the second day of February.

Q. Then about how many days must you have been at Sandusky on your return?

A. It couldn't have been less than 4; I think 3 or 4 days.

By Mr. ATKINSON:

Q. At Sandusky?

A. Yes, I should think so.

By Mr. WINSOR:

Q. It would take about how many to go from Sandusky home?

184 A. Well, it would take me less than two days; I do not recollect exactly how many it took me to go from Sandusky to Buffalo.

Q. You could go home, couldn't you, in about a day and a night?

A. Yes, sir.

Q. You went by railroad?

A. Yes, sir; I made no delay.

Q. Didn't stop anywhere on the route?

A. No, sir.
Q. Will you look at that book and state what it is?

(Book handed witness.)

A. August 28, cash $22,000.
Q. What book is that?
A. Bank book.
Q. State what bank book.
A. Bank of West Troy.
Q. That is the bank from which you drew the sum of $22,000?
A. Yes, sir; it is the only bank I did any business with.
Q. State by whom those entries were made in that bank book.
A. By the officers of the bank or clerks.
Q. State what sum appears by the entry there made by the officers of the bank as drawn on the 28th of August, 1860.

Objected to, as incompetent.

A. No answer.

By Mr. ATKINSON:

Q. These memoranda, Mr. Wiswall, on the right-hand side of the book, are checks that you had drawn on the bank?
A. I suppose so.
Q. Were not those memoranda made by the officers of the bank when your book was written up at stated periods, instead of at the time you drew the money; wouldn't you leave your book at the bank to have it written up, to have your checks entered, instead of taking your book every time you drew a check and having them note the check at that time?
A. No, sir; I calculated to take my book.
Q. When you drew a check on the bank, has it been your custom to take your book to the bank and have them charge you with the check, or has it been your custom to get your checks back at stated periods and have your book written up?
A. I think I take my book to the bank and have it written up.
Q. And get your checks back?
A. Yes, sir.
185 Q. Now, wouldn't that $22,000 be entered in that way instead of at the time you drew the money?
A. I think it would; I do not know how it would be done.
Q. It probably would be done in accordance with your general course of business, wouldn't it? Can you recall any time when you ever took your book to the bank at the same time you presented a check?
A. I do not recollect.
Q. But you would take it when you deposited money?
A. Yes, sir.

The introduction of the book in evidence is objected to, as incompetent.

By Mr. WINSOR:

Q. There is no other entry upon that bank book that day, the 28th of August, except that $22,000?

A. No, sir; it appears not; that will show.

The entry of August 28, 1860, $22,000, charged the witness on his bank book, is offered in evidence, the same as if the book was offered in evidence.

Objected to, as incompetent, the same as the book might have been objected to.

Q. At that time, Mr. Wiswall, did you have any obligations or business here in Michigan for which you had occasion to use money?

A. No, sir.

Q. Had no business except that connected with Ayres, Learned, & Wiswall?

A. No, sir.

Q. Can you recollect the disposition of those drafts?

A. I cannot.

Q. More than bringing them out here?

A. No, sir.

Q. Do you know how long after the drafts were drawn before they were used?

A. I do not.

Q. Were you not here at the time the transaction was completed?

A. No, sir.

Q. Mr. Wiswall, will you look at those papers and state what they are?

The witness is shown six drafts, marked Exhibit "R."

186 A. They were drafts on the Park Bank, New York, I think.

Q. Are those the drafts you spoke of as drawing for the sum of $22,000?

A. They are, sir.

Q. Those drafts all came to Michigan in the business of Ayres, Learned & Wiswall?

A. They did.

Q. Were you indebted to the firm at that time for anything?

A. No, sir; the firm was indebted to me; I think the firm was indebted to me all the time.

Q. At the time the Catharine A. Wiswall mortgage was executed, who figured up the amount that went into that mortgage?

A. I am not sure whether it was done at Port Austin or Sandusky; I do not know.

Q. Did Mr. Frederick S. Ayres ever say anything to you about the mortgage being given for an excessive amount?

A. Not that I recollect of.

Q. When did you first hear any such claim?

A. Quite lately; I think from my son, quite lately.

Q. You sold your interest some time afterwards in the property and assets of the firm of Ayres, Learned & Wiswall?

A. I did.

Q. To whom did you sell?

A. F. S. Ayres.

Q. Anything said then, during the negotiations of the sale, about that mortgage being excessive?

A. No, sir; not that I know of.

Q. Was the payment of that mortgage a part of the consideration of that sale?

Objected to, as incompetent, the evidence of the sale being in writing, and also the evidence of the consideration contained in that writing, and also as leading.

A. It was.

Q. How long have you known Mr. Frederick S. Ayres?

A. I should think I have known him between twenty and thirty years.

Q. Where did you first become acquainted with him?

A. West Troy.

Q. How many years were you in partnership with him in business?

A. I think about eleven, if I recollect right.

Q. During the time the firm of Ayres, Learned & Wiswall existed, did you take any part in the conduct of the business,
187 the management of the affairs of the business of Ayres, Learned & Wiswall, at Port Austin?

A. When I was up there sometimes I used to assist. I did at one time go up the shore and superintend the getting down of logs from the shore—something of that kind.

Q. How often were you in the habit of being up there—what intervals?

A. Sometimes perhaps two or three times in the course of a year, sometimes perhaps not more than once; think sometimes I was there for two or three days, and sometimes for three or four weeks.

Q. Only there a short time?

A. Yes, sir.

Q. Who had the management of the business of the firm in Michigan?

A. Ayres & Learned.

Q. To whom did you entrust the matter of the purchase of this mortgage and the business in regard to it?

A. F. S. Ayres.

Q. You entrusted it entirely to him?

A. Yes, sir.

Q. To whom did you entrust the computation of interest and arriving at the sum which should go into that new mortgage?

A. I couldn't say positively whether that was done at Port Austin or Sandusky.

Q. Was Mr. Ayres doing business for the company then at Sandusky?

A. He was.

Q. Had an office there?

A. Yes, sir; it was Ayres & Learned's office, but as I understood it, Ayres was there and attended to the sale of lumber for Ayres, Learned & Wiswall.

Q. Now, if that computation was made at Sandusky, under whose supervision was it made?

A. If it was made at Sandusky, it was made under Mr. Ayres.

Q. If it was made at Port Austin, under whose supervision was it made?

A. I cannot tell.

Q. Do you recollect who was attending to that matter there, the sale under the Austin mortgage and purchase of the property?

A. James S. Ayres; I was there at the time.

188 Cross-examination by Mr. ATKINSON:

Q. Mr. Wiswall, as I understand you, this Austin mortgage was purchased by your firm in 1860, at the time these drafts were made?

A. The Austin mortgage was purchased by my wife at that time.

Q. Purchased for your wife?

A. Yes, sir.

Q. In 1860, and then you held that for about nine years, and took this new mortgage in 1869 to Catherine A. Wiswall direct.

A. Yes, sir.

Q. It was the time you took the new mortgage you spoke of being at Port Austin and Sandusky?

A. Yes, sir.

Q. Was Mr. F. S. Ayres at Port Austin at that time with you?

A. I do not recollect.

Q. You would probably remember the trip down the shore if he was with you?

A. I do not recollect whether he was or was not.

Q. You drove through, I suppose, at that time; had to drive through to Detroit.

A. I do not recollect.

Q. Do you remember whether you drove through to Detroit, or whether you had only to drive to Port Huron?

A. I do not know whether I ever rode through to Detroit in a sled.

Q. You think you came through by team to Port Huron and by rail to Detroit?

A. Yes, sir.

Q. Do you remember stopping at Lexington?

A. No, I do not.

Q. Do you recollect stopping there to get the items of expenses of foreclosure of this Austin mortgage?

A. I could tell by referring to my memoranda whether I stopped at Lexinton.

Q. Calling your attention, can't you remember from the circumstance I mentioned, that you stopped and got the items of expenses, and made a draft on the firm for the amount, or on Ayres & Learned, of Sandusky, for the amount?

A. I do not recollect.

Q. Did you ever stop at Lexington for that purpose?

A. I do not recollect stopping for that purpose.

189 Q. Did you see Mr. Beach, the commissioner, at Lexington, or Mr. Devine, the solicitor?

A. Not that I recollect of.

Q. Did you ever see Mr. Devine at Lexington, John Devine?

A. It appears to me that I have, but I have no definite recollection.

Q. Or his partner, Mr. Wixson, now Judge Wixson?

A. I have no definite recollection.

Q. You think you have seen Mr. Devine?

A. I think I have.

Q. Do you remember any other trip on which you would have been likely to have seen him except this one?

A. I have stopped at Lexington a good many times.

Q. You had the mortgage business on hand at that time; you were arriving at the amount due on the old Austin mortgage as near as you could get at it, were you not?

A. I do not recollect; I do not recollect ever seeing Mr. Devine or Mr. Wixon.

Q. What is your age?

A. I shall be 74 next August.

Q. These matters occurred a good while ago, and I suppose some of the details have gone from your memory?

A. I supposed the matter was all settled.

Q. Did you stop at Detroit on your way down that time, and see Mr. Holbrook?

A. I made no delay here, for in my expenses there is no charge for expenses at Detroit.

Q. Then you only state you did not make the delay because you do not find the charge of expenses?

A. Yes; no memoranda of expenses at Detroit.

Q. Your testimony would depend upon that state of your book rather than upon your memory?

A. Partly.

Q. Now, didn't you stop and get Mr. Holbrook to draw that mortgage?

A. I think not, sir.

Q. You were in the habit of calling to see Mr. Holbrook when you were here, were you not?

A. Occasionally; I didn't always.

Q. Now, do you remember whether you did or did not see him that time?

A. I do not know.

Q. Where did you stop that time in Detroit?

190 A. I do not know that I stopped at all.

Q. Where did you take the train for Sandusky?

A. At the usual place, I suppose.

Q. Have you any memory of it, whether you got right off the

Grand Trunk train on the Sandusky train, or whether you stopped at the hotel?

A. I do not think I stopped at a hotel.

Q. What hotel were you in the habit of stopping at when you were here?

A. The Michigan Exchange.

Q. Do you remember just what day it was; you say the 25th of January you left Port Austin?

A. Yes, sir.

Q. How long did it take you to come to Port Huron?

A. That I couldn't say.

Q. Do you know the distance?

A. I think it is about 90 miles, if I recollect right.

Q. Do you remember whether you made it in two or three days?

A. I do not think I ever was three days in coming out.

Q. Did you come by stage or special conveyance?

A. I do not know whether I came that time by special.

Q. What time did it usually take you when you came out by stage?

A. I do not recollect ever making it on runners by stage; I do not ever recollect making it but twice in sleighing; once I came down with a team from the livery stable above, that came up there to get some passengers, and once Jenks, a livery stable man, sent Mr. Learned and me down.

Q. This time when you came down did you come on runners or wheels?

A. I judge on runners.

Q. Did you go that time with Jenks' team or the other?

A. I didn't go with Jenks' team.

Q. The other was a livery team that you got here?

A. The other came to fetch some passengers to Port Austin.

Q. Then you came back with that livery team, did you?

A. I couldn't tell; I do not recollect ever coming in the winter but twice, and when I came back in the livery team Mr. Ayres was with me.

Q. That probably wouldn't be the time you spoke of, as you do not recollect Mr. Ayres being at Port Austin at the time.

A. I do not recollect.

Q. How long had you been at Port Austin at that time?

191 A. I went up about the first of the month, sir; I stopped at Sandusky on my way up.

Q. The intention of giving the new mortgage from your firm to Catharine A. Wiswall was to secure her for the amount due on the old mortgage, wasn't it?

A. Yes, sir.

Q. There was no other consideration for it, was there, than the old mortgage?

A. I think not.

Q. And you cannot recollect where the computation was made or by whom; and when you say if made at Sandusky it was made

under the supervision of Mr. F. S. Ayres, you do not mean to swear it was made at Sandusky?

A. No, sir; if my memory serves me it was made at Sandusky, but I do not remember positively.

Q. Mr. F. S. Ayres has not been in the habit, has he, of computing interest on such matters as that; it has generally been done by a book-keeper or accountant.

A. I should think so.

Q. You haven't been in the habit of making the computations yourself, except to supervise them?

A. Yes, sir.

Q. Now, can you recall any accountant at Sandusky or any third person called in to make such a computation?

A. If it was made at all it was made probably in the office; I do not recollect distinctly.

Q. What I want to get at is, whether you remember employing some third person to do that kind of thing for you?

A. No, sir.

Q. Where did you see Mr. and Mrs. Ayres?

A. At Sandusky.

Q. At what place?

A. At the West House.

Q. At the hotel?

A. Yes, sir.

Q. They were boarding there?

A. Yes, sir.

Q. Do you recollect whether it was in the evening you saw them first?

A. No, sir.

Q. You do not recollect the time of day?

A. No, sir.

Q. It was there you signed the mortgage?

A. Yes, sir.

192 Q. What time did you get into Sandusky?

A. I cannot say, sir.

Q. Can you tell what time you left Detroit?

A. No, sir.

Q. Can you tell what time you left Sandusky to go home?

A. No, sir.

Q. Whether it was a night train or day train you took?

A. No, sir; I cannot.

Q. Have you been in the habit of keeping a diary showing your trips?

A. Yes; I generally keep my expense account.

Q. And I suppose you have been in the habit of trusting to your diary rather than to your unaided memory?

A. Of course, in some degree.

Q. You made the memoranda because you didn't want to trust to memory?

A. Yes; it wouldn't be very satisfactory to my partners if I hadn't

something more to show than saying it cost me $20 or $30 or $15 to come out here.

Q. Then your main purpose in keeping the memoranda was to have the detail of expenses for the satisfaction of your partners, and rendering a proper account to them?

A. Yes; every time I came up here it was carried on their books.

Q. The trips you made were made for the firm, and the expenses were paid with the firm?

A. Yes, sir.

Q. Your partners, Learned and Ayres, managed the business, one at Sandusky and one at Port Austin?

A. Well, Mr. Ayres spent most of his time at Sandusky; he used to go up occasionally and take part in the management of the business at Port Austin.

Q. And Mr. Learned was the resident partner there?

A. Yes, sir.

Q. Did you have anything to do with the management of the business anywhere—financial business?

A. I got notes discounted for them.

Q. You attended to the financial business then at West Troy?

A. Yes, sir; part of the time.

Q. You discounted notes and paid bills?

A. Yes, sir.

Q. They made drafts on you, or sent you notes for discount?

A. And I would take the money and go and pay the bills.

Q. The business of the firm, then, was conducted, different
193 parts of it, at three different places: Sandusky, West Troy, and Port Austin?

A. Yes, sir.

Q. Where the three partners were residents?

A. I paid the bills out of my own money, and when I came up I got the company's notes for it sometimes.

Q. You took care of the affairs East?

A. Part of the time.

Q. In additlon to being partners, you were relatives, were you not?

Q. Yes, by marriage.

Q. How were you related?

A. Mr. Learned was a brother-in-law of mine; Mr. Ayres was no relation, only to Mr. Learned, through Mrs. Learned.

Q. Mr. Learned married your sister?

A. I married Mr. Learned's sister.

Q. And Mr. Learned and Mr. Ayres married sisters, is that it?

A. That is the relation they claim.

Q. Then Mrs. Wiswall was a sister to Mrs. Learned; now, you say you drew this $22,000 from the bank for the purpose of paying the Austin mortgage?

A. Yes, sir.

Q. What did you do with the drafts when you first got them?

A. I brought them to Port Austin.

Q. You carried them to Port Austin?

A. That is, if I recollect right.

Q. What time of the year did you go there?

A. I think I started the next day, if my memory serves me, which would be the 29th.

Q. When was it the Austin mortgage was purchased?

A. Well, it was some time before Mr. Ayres—

Q. It was in October, 1860, wasn't it?

A. Mr. Ayres informed me he had got an assignment; there was some question between them about the sum.

Q. Then your recollection is, that you brought the drafts to Port Austin and there left them?

A. I think so.

Q. Was Mr. Ayres residing at Port Austin at that time?

A. I think his family was in West Troy, if I recollect right; I do not know whether he had at that time moved to Port Austin or not.

Q. Was he seeing to the business in Port Austin in 1860?

A. I do not know; I do not recollect whether he was there all the time or not.

194 Q. Do you recollect his being there at that time?

A. 1860?

Q. Yes?

A. Yes.

Q. When did you buy the Port Austin property?

A. 1859, I think.

Q. Who went up there first?

A. I think Mr. Ayres.

Q. Did he take charge of matters first?

A. Not fully, I think.

Q. But think he was there some?

A. Yes, sir.

Q. Who did take the principal charge of things first?

A. Mr. Learned was there first, I think.

Q. Do you remember seeing them both there in 1860 when you went up?

A. Yes, sir.

Q. Seeing them both?

A. I have seen them both there in 1860.

Q. Did you see them on this trip when you took up the $22,000?

A. I think I saw Mr. Ayres on that trip in Detroit.

Q. Did you see him at Port Austin?

A. I couldn't say positively; I saw him either here or at Port Austin.

Q. Then if you left the drafts at Port Austin—

A. I saw him either here or at Port Austin; the drafts, according to my memory, were left with him.

Q. You left the drafts with him at either place, did you?

A. I think so.

Q. Did you endorse the drafts over to him when you left them?

A. I do not recollect.

Q. They were payable to your order, were they?

A. Yes, sir.

Q. Was that the time you endorsed them over the endorsements upon them show?

A. I presume that was the time they were endorsed over.

Q. They were endorsed over, then, at the time you left them?

A. I presume so.

Q. Do you recollect endorsing any of these drafts over to any one else but Mr. Ayres?

A. It appears to me there were two small drafts that were endorsed to somebody else, if I recollect right.

195 Q. Two small drafts endorsed to somebody else; what amounts were they?

A. The small drafts were $500 each.

Q. Then two of those small drafts were not endorsed over to Mr. Ayres, two of $500 each? It is your recollection that two of these drafts, for $500 each, were not endorsed over to Mr. Ayres?

A. I think so.

Q. To whom were they endorsed?

A. One I guess to Mr. Learned.

Q. That is one of the $500 drafts endorsed over to Mr. Learned; that is draft No. 35043, Exhibit "R," that was endorsed to Mr. Learned?

Draft handed witness.

A. So it appears.

Q. When was that done?

A. I cannot tell you.

Q. You didn't deliver that draft to Mr. Ayres, did you, that you endorsed to Mr. Learned?

A. I do not know whether I did or not; I presume I did.

Q. To Mr. Ayres?

A. I presume so.

Q. Why was that endorsed to Learned?

D. Perhaps to pay some company debts; I cannot tell any other way.

Q. It couldn't have been endorsed to Learned if you left it with Ayers to buy this Austin mortgage?

A. $22,000 I drew to pay this Austin mortgage.

Q. If you endorsed this draft to Mr. Learned, how could you have left it with Mr. Ayres to pay this Austin mortgage?

A. I couldn't tell.

Q. Didn't you say you couldn't have done it?

A. No.

Q. Was Mr. Learned present when you delivered the drafts to Mr. Ayres?

A. I cannot say.

Q. Do you know any reason for making one of those you left with Ayres payable to Learned?

A. I couldn't say.

Q. Did you ever understand that any of this money you paid Mr.

Ayres for the Austin mortgage passed through the hands of Mr. Learned?

A. I do not recollect.

Q. Did you ever hear of any such a thing, any portion of
196 it passing through Mr. Learned's hands from you to Ayres?

A. I do not know anything about it.

Q. You trusted Mr. Ayres in the matter, didn't you?

A. I did.

Q. And didn't pay any portion of it into Mr. Learned's hands?

A. Not that I know of.

Q. You had some private dealings with Mr. Learned, didn't you, in which Mr. Ayres wasn't interested?

A. Yes, but not until two years after that.

Q. You had none, then, at this time?

A. Not then. I had some private dealings with Mr. Learned; I bought a piece of property.

Q. You had none at that time?

A. I think not, sir.

Q. Did you ever advance any money to Mr. Learned for any purpose at this time?

A. Not that I know of.

Q. If this was endorsed over to Mr. Learned, you think it was on the firm account?

A. I do not know any other way.

Q. And probably went into your account with the firm?

A. I have no recollection about it whatever; only what I see there.

Q. Do you know whether it was endorsed to Ayres, Learned & Wiswall, instead of Charles G. Learned?

A. No, sir; I have no recollection about it whatever, I say.

Q. How was this draft of $500 used?

A. That I do not know.

Q. That you do not know?

A. Nothing only what the draft shows there, sir; I have no recollection whatever about it; I supposed the matter was all settled up and I did not charge my memory with it.

Q. You do not recollect, you say, how the other $500 was endorsed or to whom?

A. No, sir.

Q. But your recollection is, it wasn't endorsed over to Mr. Ayres?

A. I see by the paper itself it was not.

Q. Have you any memory as to how that draft was used?

A. No, sir.

Q. These other drafts, except the two $500 drafts, Exhibit "R," were all specially endorsed over to the order of F. S. Ayres?

A. Yes, sir.

Q. Now, Mr. Wiswall, can you give us any reason why
197 you would have endorsed those two drafts differently if you delivered them to him at the same time?

A. I have no recollection whatever.

Q. And for the same purpose?

A. I have no recollection whatever.

Q. What was the object of making that endorsement to F. S. Ayres?

A. That he could use them, I suppose.

Q. Wasn't there still another object, that nobody else could use them but him; in case of their loss, or anything of that kind, he could have used them if you had endorsed them in blank?

A. I suppose it was that he could use them and nobody else.

Q. Wouldn't the same reason have applied to these other two drafts, if you had delivered them to him at the same time?

A. I suppose they would.

Q. Then do you still say that you delivered these drafts all together, and for the same purpose and at the same time?

A. I think so.

Q. And you cannot think of any reason why you drew them differently, if you did?

A. No, I cannot.

Q. Now isn't it the fact, that the drafts you delivered to Mr. Ayres were delivered to him at West Troy?

A. I think not; I think not from the fact I came out here the next day; according to my memoranda I came out here the next day.

Q. Wasn't Mr. Ayres at West Troy between the time you came out here and the time the Austin mortgage was purchased?

A. Not that I know of.

Q. Do you mean to say that you think he wasn't, or that you have no recollection on the subject?

A. I have no recollection whether he was or not.

Q. Didn't you come out here on purpose to arrange with Mr. Holbrook and Mr. Austin about the payment of the Austin mortgage?

A. I do not recollect whether I came on purpose for that or not.

Q. What other business had you?

A. I had an interest in that concern up there, that naturally would give me some business out here.

Q. Now, when you came, did you see Mr. Holbrook at that time when you stopped in Detroit?

A. Probably; I do not recollect.

Q. Did you see Mr. Austin?

198 A. No, sir, I think not.

Q. Then didn't you go back to West Troy and see Mr. Ayres and arrange with him to go out and close the matter up?

A. Not to my recollection, sir. I think I have letters to show that Mr. Ayres was here and attended to that business.

Q. There is no doubt he was here and attended to the business at the time, but where he got the money from you is what I want to get at; you say you do not know who made the computation of the amount due on the Austin mortgage?

A. I presume Mr. Holbrook did.

Q. The amount due on the Austin mortgage when you purchased it?

A. I presume he did at the time of the purchase.

Q. When you took the new mortgage to Catharine A. Wiswall do you know who made the computation?

A. I do not recollect.

Q. Do you know whether it was made on the basis of $22,000 or $21,000?

A. I do not; I do not know; I didn't charge my mind with it, as I said before; I supposed the matter was all settled. Mr. Ayres, I do not think, ever paid anything he was not obliged to.

Q. That is the principle of all good business men, isn't it, in all parts of the country?

A. Yes, sir.

Q. You never do yourself, do you?

A. No, sir; I never pay anything unless I ought to; I never have to be sued, though.

Q. If they wanted you to pay more than you ought to, you would have to be sued, wouldn't you?

A. No, sir; I never have been sued yet; I never expected anything of the kind from Mr. Ayres.

Q. There would never have been any trouble if you had attended to the business, Mr. Wiswall; when did you last see this bond and mortgage to Catharine A. Wiswall?

A. The original?

Q. Yes?

A. I do not recollect when I last saw it, but the first I missed it was at Toledo.

Q. At Toledo?

A. Yes; I had my satchel stolen out of the sleeping car there.

Q. You had it in your satchel?

A. I wouldn't swear it was in my satchel, but I had some papers there; I had come from Port Austin direct; but it might have been stolen at Port Austin.

199 Q. Had you the papers with you on that trip?

A. I had some papers.

Q. Had you the bond and mortgage?

A. I do not know whether I did.

Q. Then you do not know whether it was stolen at Port Austin or Toledo?

A. No, sir.

Q. When did you leave home on that trip?

A. I do not recollect.

Q. Do you recollect taking them with you when you left home?

A. I cannot tell without referring to my memoranda.

Q. Do you recollect having it with you at all on that trip when you left home?

A. I couldn't, sir.

Q. About what year was that?

A. That the new mortgage was given?

Q. No; that you claim that the new mortgage was lost?

A. I couldn't tell.

Q. And the bond?

A. I couldn't tell.

Q. You think it was lost on a trip that you made from West Troy to Port Austin?

A. No, sir; from Port Austin home.

Q. Well, it was on your return from that trip?

A. Yes, sir; my recollection serves me it was on my return from that trip.

Q. That you took it from West Troy with you?

A. Yes, sir.

Q. What did you take it for?

A. Well, I cannot say.

Q. Do you remember putting it in your satchel when you left West Troy?

A. I cannot swear positively.

Q. Where were you in the habit of keeping this bond and mortgage?

A. Among my papers; I usually kept them in my safe at home.

Q. Had you been in the habit of endorsing upon the bond, before it was lost, the payments that had been made?

A. I think so.

Q. So if that bond could be found it would show the endorsements?

A. I should think so.

200 Q. When was this other duplicate made, before or after the loss?

A. After the loss; I wouldn't want the duplicate if I had the original.

Q. This was a copy?

A. Put on record after the loss.

Q. It wasn't a duplicate, then?

A. I do not know what we call it.

Q. You think it was made from the record?

A. It was said to be, and certified to.

Q. You mean the mortgage?

A. The mortgage.

Q. But the bond?

A. I do not know anything about that; I have no recollection whatever.

Q. When was it made?

A. The bond will show when it was made, I suppose.

Q. You have no recollection of when it was made?

A. No, sir.

Q. This was not made as a copy at all, was it?

A. From the records.

Q. From the records, Exhibit "B"?

A. I understand it so.

Q. Did you understand, then, that the original was upon record?

A. You have reference to the bond?

Q. Yes.

A. I do not understand the bond was recorded; I suppose that bond was made by Mr. Ayres; I do not know.

Q. Wasn't it a new bond given to you because you had lost the old bond?

A. Yes, sir.

Q. Not purporting to be a copy, but a new obligation?

A. I understand it so.

Q. In whose handwriting is this copy?

A. I do not know.

Q. Do you remember getting Mr. Van Woert to draw it?

A. Probably I did.

Q. Would you know Mr. Van Woert's handwriting?

A. I think so.

Q. Is that in his handwriting?

[Paper handed witness.]

A. I think so.

Q. He was your book-keeper?

201 A. He was book-keeper of the concern.

Q. Was the original bond signed by James S. Ayres—is that his signature?

A. I guess not.

Q. You think not?

A. I think not.

Q. So that this is not a copy of the original nor a duplicate?

A. This is signed James S. Ayres as security.

Q. Now was the original bond signed James S. Ayres as security?

A. I think not, sir.

Q. This was a new bond?

A. To supply the place of the old one.

Q. That you informed them was lost?

A. Yes, sir.

Q. When was this made, if you know?

A. The date shows better than I can remember.

Q. It is dated the same day as the mortgage; it must have been long after it.

A. I do not know anything about it; I should think it was made the same day it is dated.

Q. Do you think it was made the same day as the mortgage?

A. I do not know anything about it.

Q. You recollect having the old bond for some time, don't you—the old bond and mortgage for some years?

A. I presume I had it, of course.

Q. And then at the time you lost them it was some years after they were executed?

A. Yes, sir.

Q. And this wasn't made until after you lost the old one?

A. Of course it was not.

Q. And it must have been dated back if it appears to be dated the same day as the original bond and mortgage?

A. Is it dated back to the same day?

Q. Yes; dated back to 1869, which I understand is the same date the original was given.

A. To Catherine A. Wiswall?
Q. Yes.
A. It must be dated back, then.
Q. It wasn't made the day it purports to have been made?
A. I do not know only what it shows there.
Q. You know you hadn't lost them until long after?
A. Of course I do.
Q. Then you know this is dated back?
202 A. If it is dated the same day as the original mortgage.
Q. Then it is dated back?
A. Yes.
Q. And in addition to the original obligators—Wiswall, Ayres and Learned—J. S. Ayres signed this as security?
A. So it appears.
Q. When did you search for the original bond?
A. I wrote back to Toledo a number of times with regard to the loss of the package.
Q. You never were able to recover your package?
A. No, sir.
Q. When did you search at home to see if you had it?
A. I didn't search at all there; I know it isn't there.
Q. You never have searched at all among your papers?
A. I have gone over my papers one hundred times since then, and have not seen it.
Q. Have you ever searched among your papers for the express purpose of finding this bond and mortgage, if they were there?
A. No, sir, I do not think I have; my bonds and mortgages are all kept together there, and I know it isn't there.
Q. What was the volume of business per year of Ayres, Learned & Wiswall at the time this mortgage was given—1869?
A. I couldn't say, sir.
Q. About what?
A. I couldn't say.
Q. What business were they in?
A. Lumber, mercantile.
Q. Manufacturing lumber?
A. Yes, sir.
Q. And salt?
A. In 1869? I think so.
Q. Real estate business largely?
A. Yes, sir.
Q. About how much land did they have at that time?
A. I couldn't say, sir.
Q. Some twenty-eight thousand acres?
A. I think over twenty thousand acres.
Q. Had a salt-block at Port Austin?
A. I think there was.
Q. A saw mill at Port Austin?
A. Yes, sir.
Q. About what quantity of lumber did they manufacture per year, do you know?

A. No, sir; I cannot say.

203 Q. Can you give us an approximate idea?

A. No, sir.

Q. They would do several hundred thousand dollars of business in a year, wouldn't they?

A. I couldn't say how much.

Q. You kept pretty close track of the business at the time, didn't you?

A. I have inventories a number of them at home, but I have no recollection.

Q. But their business was reported to you, the transactions from time to time?

A. Yes, sir.

Q. You can give us no idea of what the volume of business was?

A. No, sir; it was a pretty large business, I know that.

Q. A large mercantile business besides their lumber business?

A. Yes, sir.

Q. Did they do a credit business to some extent?

A. Yes, sir.

Q. Went in debt themselves, and trusted others?

A. Yes, sir; I know one part of it they did; they went into debt themselves pretty well.

Q. It was quite an extensive business firm, wasn't it, at that time and for some years afterwards?

A. Yes, sir.

Q. What was the property up there valued at in 1869?

A. I couldn't tell, sir.

Q. You afterwards sold your interest in it?

A. Yes, sir.

Q. What was your interest?

A. One-fourth.

Q. What did you sell for, any amount over and above all indebtedness and incumbrances; what did you sell your interest for?

A. I cannot recollect now.

Q. Don't you recollect how much you got for your quarter interest?

A. No; I do not recollect the amount.

Q. Have you any idea of it at all?

A. No; I have not.

Q. How long is it since you sold out?

A. Let's see—

Q. Can't you recollect that?

A. No, sir.

204 Q. About how many years?

A. I should think six, seven, or eight years.

Q. Seven or eight years?

A. I do not know that it was as much as that.

Q. Can you tell within $5,000 of what you sold out for?

A. No; I cannot without refreshing my memory.

Q. Has your memory been impaired in any way recently, or has it always been as it is now?

A. I think I could remember a little better when I was younger; I think Mr. Ayres is not as old a man as I am, and I think his memory is considerably impaired.

Redirect examination by Mr. WINSOR:

Q. Do you recollect about how long a time it was between the time you procured these drafts and the time that the negotiation for the property was completed?

A. I do not; I think I have a letter, or you must have in your possession, I guess.

Q. You remember those negotiations were pending for some time?

A. Yes; if I recollect right, the papers were left in K. C. Barker's hands for something until the full amount should be paid.

Q. Do you recollect anything about any other drafts besides these being procured at the bank of West Troy for that purpose, or in any part for that purpose?

A. Drafts?

Q. Yes.

A. I think not; I do not recollect any.

Q. Any draft procured on part of your company?

A. I think there was something drawn from the bank for the company at that time.

Q. Do you recollect the amount?

A. It appears to me it was six thousand dollars.

Q. Was that draft brought out here from West Troy?

A. I think so; it was drawn at the same time, and it undoubtedly came out here; I have no recollection.

Q. Do you recollect anything about the substitution of two of these drafts, on account of their being smaller amounts, for a part of this six thousand dollars?

A. I do not.

Q. Do you find any memoranda referring to a five hundred
205 dollar draft to Learned, to be taken out of a company draft for six thousand dollars?

By Mr. ATKINSON:

If you have any memoranda, let us see it.

By Mr. WINSOR:

Q. A memoranda to that effect?

A. I think there is some memoranda to that effect.

Q. But you do not recollect the fact of the disposition from your own memory?

A. No, sir; I do not from my own memory.

Q. But you do recollect there was a six thousand dollar draft besides these twenty-two thousand dollar drafts, which was a company draft?

A. I do not know whether it was in a draft or merely checked out?

Q. Do you recollect whether you have got it in your diary?

A. I have got it in my diary.

Q. Do you recollect whether it is a draft or check?

A. No; I do not recollect whether it is a draft or check.

Q. This draft endorsed in blank by you, have you any recollection who used that?

A. No, sir.

Q. More than you drew it, and brought it out here with the others?

A. That is all the recollection I have.

Q. Do you recollect whether these drafts went back to West Troy at one time, because the negotiations were not completed?

A. I think not.

Q. This endorsement, "Eben Wiswall," upon each of these drafts, is in your handwriting?

A. Yes, sir.

Q. Do you recollect anything about the premiums on these drafts?

A. I had a letter from Mr. Ayres stating he had a premium which was due me; I think I am very positive I had.

Q. Did you ever receive that premium?

A. I do not recollect ever receiving it; I would not recollect anything about it were it not in the letter probably.

Q. Do you recollect anything more in regard to that premium in 1869?

A. I do not.

Q. Do you know anything individually about the sum that was due upon the Austin mortgage to Catherine Wiswall at the time the new mortgage was given?

A. I do not; no, sir.

206 Q. Do you know anything about how much that mortgage called for over and above what you paid for it?

A. I do not recollect; I probably knew at the time, but I do not recollect anything about it.

Q. Did you have anything to do with the foreclosure of the mortgage, directing its foreclosure and the sale under it?

A. Mr. Ayres, I guess, attended to all that.

Q. Frederick S. Ayres?

A. Yes, sir.

Q. Attended to that business, and notified you from time to time?

A. Yes, sir.

Q. Do you know anything about the making of this bond, or when it was made, of your own knowledge?

A. No, sir.

Q. Do you know whether it was made at the time the original was made, or made afterwards?

A. I do not know.

Q. Didn't you see it made?

A. I do not know whether I saw it made or not; I cannot say.

Q. Do you know whose handwriting the words on Exhibit "B," "Duplicate bond, the original lost, mislaid, or stolen," is in?

A. I should say that was Mr. Van Woert's, sir.

Q. The red ink?

A. I cannot see that well enough to say.

Q. Now, do you know whether the original bond and mortgage is actually lost or not?

A. I know I haven't got it; it is lost to me.

Q. Have you since this suit has been pending examined all of your papers to find anything relating to this matter?

A. I have; not for that particularly, but to find anything relating to this mortgage.

Q. And haven't been able to find anything of the bond and mortgage?

A. Yes, sir.

Q. Do you know whether that premium upon those drafts went into the new mortgage in 1869, and interest upon it?

A. I couldn't tell you.

Q. Nor you couldn't state of your own knowledge how the interest was computed?

A. No, sir.

207 Q. Had nothing to do with the computation of interest?

A. I think not.

Recross-examination by Mr. ATKINSON:

Q. You think the papers remained in K. C. Barker's hands a long time?

A. There were some papers.

Q. Didn't those papers that remained in K. C. Barker's hands remain there and never go out of his hands?

A. I couldn't tell.

Q. You do not mean to say they remained in Barker's hands merely until the negotiation was completed?

A. I couldn't tell how long.

Q. Wasn't they left there until some disputed amount should be settled by the court in chancery in Sanilac county?

A. There was some disputed account. I think they were left there until that should be settled.

Q. And the amount was paid to Mr. Holbrook?

A. Yes, sir.

Q. This foreclosure of the Austin Mortgage—you say Mr. Ayres managed that foreclosure. Was it commenced before you bought the property?

A. I think not.

Q. It was commenced before you bought the Austin mortgage, was it, and pending at that time?

A. I think not.

Q. Is that your recollection, that your firm bought the Austin mortgage first and then foreclosed it against yourself?

A. That cannot be.

Q. Catherine A. Wiswall never foreclosed any mortgage after it was assigned to her, did she?

A. I think not.

Q. It must have been foreclosed before you bought it, or in foreclosure?

A. I have no rellection about it.

Q. You acted entirely for Catherine Wiswall, didn't you?
A. Yes, sir.
Q. She did nothing for herself?
A. No, sir.
Q. And you know she never foreclosed the mortgage after she got it?

A. I think not.

208 Q. So that this foreclosure must have been commenced before?

A. I have no recollection of anything about it.
Q. No recollection about it at all?
A. No, sir.

Redirect examination by Mr. WINSOR:

Q. You were not here, were you, and had nothing to with it?
A. No, sir.

Whereupon the further hearing of said matter was adjourned until two o'clock, sharp, in the afternoon of said day, at which time the parties appeared as before, and the examination of the witness resumed.

Redirect examination by Mr. WINSOR:

Q. Have you refreshed your memory from your diary in regard to that $500 draft of Learned's?
A. Yes, sir; I find on my memoranda, or book, a memoranda where it was to be taken out of the Port Austin draft.
Q. Given to Learned and to be taken out of the Port Austin draft?
A. Yes, sir.
Q. You also find a memoranda of the Port Austin draft on your diary?
A. Six thousand dollars; it was taken out of the bank at the same time these others were.

Re-cross-examination by Mr. ATKINSON:

Q. How was it to be taken out of the other drafts?
A. I made a memoranda—
Q. Where is that memoranda?
A. It is at the hotel; I suppose it is there.
Q. I would like to see the memoranda.

The testimony is objected to as to what is contained in the memoranda, unless the memoranda is shown to the counsel, the contents of which he undertakes to testify to.

Q. Have you any memory distinct from the memoranda of the facts?

A. No.

209 Q. Then you know nothing of this except what your memoranda states, and your memoranda you haven't with you?

A. No, sir.

Q. How do you understand that you took the draft that was endorsed to Learned out of the six thousand dollar draft?

A. I do not recollect anything about it.

Q. How could it be taken out?

A. I suppose it was paid out for some of the Port Austin debts.

Q. You mean Mr. Ayres paid five hundred dollars of that six thousand dollars to Learned?

A. I couldn't say, sir, from memory.

Q. That would be the only way it could be taken out, isn't it? This was a draft to yourself given to Learned for five hundred dollars; now, how could that draft be taken out of the six thousand dollar draft?

A. I do not know only as my memoranda refreshes me; I suppose that the books will show.

The memoranda book referred to is handed to defendants' counsel by complainants' counsel.

Q. Is this the only memoranda that is on your diary under the date of August 28?

A. No, sir, I think not.

Q. What other memoranda is there?

A. Appertaining to this?

Q. Yes, sir.

Witness turns to the place in the book.

A. It appears by that it went on the company's books, I should judge; I suppose that means it went on the company's books.

Q Then this memoranda of September 15 shows that you gave this draft to C. G. Learned himself, and that it was to be taken out of some draft belonging to the company to reimburse you?

A. I suppose that is it.

Q. The "Gray Eagle" draft; what does that mean?

A. Gray Eagle has nothing to do with the draft.

Q. What is it?

A. That was the name of a boat that I was trying to charter.

Q. Mr. Learned was probably connected with this Gray Eagle?

A. No, sir; my recollection serves me that was the name of the boat.

Q. Then this is the memoranda: "September 15, gave C. G. Learned draft for $500 on E. Wiswall, which is to be
210 taken out of the company draft." Now, then, Mr. Wiswall, you made that memoranda under the date of September 15; did you, before that, deliver the draft to buy the Austin mortgage to Mr. Ayres?

A. I do not recollect, sir.

Q. I understood your statement this morning to be you came west the 28th.

A. I do not recollect what time I delivered the draft to him.

Q. Have you any memoranda of the delivery of the draft to Mr. Ayres?

A. No, sir, not that I know of.

Q. What do you say now as to this $500; was it delivered to Mr. Ayres or did it go to Mr. Learned?

A. I suppose it was delivered to Mr. Learned.

Q. Have you been able to refresh your memory as to the other $500?

A. No, sir.

Q. Do you know whether, at the time you took the mortgage to Catherine A., George A. Van Woert was working for the company at Port Austin?

A. I do not know as I ever took the mortgage to her.

Q. I mean the mortgage running to her. Do you know whether Van Woert was then working for the company?

A. I think he was.

Q. Where?

A. At Port Austin.

Q. He worked there for you awhile, for yourself individually, didn't he?

A. I didn't understand it so; he was under the direction of the company all the time.

Q. I was under the impression that he worked for awhile for you.

A. I never knew that he worked for me individually.

Q. Did you have him make a computation before you left Port Austin?

A. I do not recollect whether I did or not; I do not recollect where the computation was made; I think it was made at Sandusky.

Q. You do not recollect, then, his making the computation and you taking it with you to Sandusky and giving it to Mr. Ayres?

A. I do not remember, sir.

Q. Will you look at that paper and see if it refreshes your memory in any way?

(Paper handed to witness, which he examines.)

211 A. Well, sir, I have no recollection about this.

Q. Whose handwriting is this?

A. I should think Mr. Van Woert's.

Q. You think that was George Van Woert's?

A. I think it is, sir.

Q. When you were at Port Austin, who was in the habit of doing your figuring and writing for you?

A. I always rendered my accounts there, and he was book-keeper and he did it.

Q. Then he was in the habit of making the computations necessary for you in the business or in your dealings with the company?

A. He did it; I do not know.

Q. You recognize this as his handwriting, do you?

A. I think it is, sir.

Q. But you cannot recall how Exhibit "S" could have any connection with it?

A. I couldn't; as I said before, it was a thing I supposed was entirely settled, and I charged my mind with it no further.

Q. Can you recollect talking with Van Woert at all at Port Austin about the mortgage?

A. I presume I have; I do not recollect distinctly.

Q. At the time you were there before you went to Sandusky, and had the mortgage signed at that time, did you have any talk with Van Woert?

A. I have no recollection.

Q. And you cannot recollect at that or any other time having him make the computation which is marked Exhibit "S"?

A. No, sir.

Q. And you say you do not recollect delivering this or any other paper to Mr. Ayres, at Sandusky?

A. No, sir.

Q. Would you say you didn't deliver it?

A. I couldn't recollect it, sir; I wouldn't say I did or did not.

Q. Now, Mr. Wiswall, why did you make that memoranda of September 15; did the $6,000 draft go to Mr. Ayres?

A. I find that I drew it when I was coming out here; I have no other recollection, only what that memoranda shows.

Q. You furnished this $500 draft—you must have furnished the means to pay it?

A. Yes, sir.

Q. And the company, as I understand you, furnished the means to buy the six thousand dollar draft?

212 A. The six thousand dollars was for the company according to my memoranda.

Q. Now, did you get a portion of that draft back to pay you for the five hundred dollar draft in something?

A. I do not know anything about it, sir.

Q. You must have got five hundred dollers back, must you not, if that memoranda is correct?

A. Yes, sir; I suppose the books show.

Q. Then, if I understand you right, whatever was done with the six thousand dollar draft to the company and the five hundred dollar draft to Learned, they all went on the books of the company and are shown by the company's books?

A. I suppose so.

Q. And settled with the company affairs?

A. I suppose so.

Q. Then it had nothing to do with the mortgage?

A. I do not know; the books will show what it was for, I presume.

Complainants' counsel requests the memoranda or statement marked Exhibit "S," in regard to which the witness has been questioned, for the purpose of further questioning him in regard to it, and testing his recollection of it, and calling his attention as to other points and inquiring as to the handwriting.

Mr. ATKINSON: I refuse to furnish the paper, having merely submitted it to the witness to see if he had any recollection of it that would make it competent evidence, and he having sworn that he

has not, I have not offered it in evidence, and received back the paper, which your side have no interest in at present.

Complainants' counsel moves to strike out all the testimony of the witness in regard to the paper.

Mr. ATKINSON: We consent to that.

Redirect examination by Mr. WINSOR:

Q. Were those entries, under date of August 28, 1860, "draft on New York to E. Wiswall, one of $18,000, three of $1,000, two of $500, one left out, $6,000, A., L. & W.," all made by you?

A. Yes, sir.

Q. And all made at the time?

A. Yes, sir.

Q. Did you start west for Port Austin soon after that?

A. I think the next day.

Q. Can you tell by the memoranda?

213 A. Yes, I think I can.

Q. Refresh your memory by the memoranda on your diary of expenses.

Diary handed witness.

A. Yes, started the next day.

Q. Do you recollect when you returned east again to Troy?

A. Not definitely; I think I was out here some time; I can state by refreshing my memory; I think I was out here nearly a month.

Q. Do you recollect being at Buffalo, on the 25th, on your return home?

A. I couldn't say the day without refreshing my memory.

Q. Just look at your diary there of the 25th, and say if you can refresh your memory as to being on your way home that day at Buffalo.

A. The 24th, sir.

Q. You seem to have carried the different items of the 24th on the 25th.

A. I was at Buffalo here under the date of the 24th.

Q. When you returned at that time this mortgage purchase wasn't settled up, was it?

A. I think not.

Q. Now, can you recollect, by examining that diary and seeing those entries, that when you returned home you carried a portion of those drafts back with you?

A. I never did, sir.

Q. You say you do not recollect?

A. No, sir; I never did.

Q. Will you look at that letter and see if you afterwards remember receiving it?

Letter handed witness.

A. Yes, sir.

Q. Do you recollect whether you took a part of those drafts back at that time—those that were not used?

A. I am very certain that I did not.

Q. The several drafts were entered on your memoranda on the 28th of August; were they all brought for the same purpose?

A. I suppose so.

Q. Then when you entered on your diary here five hundred dollars to be taken out of the Ayres, Learned & Wiswall draft, you refer to the six thousand dollar draft?

A. I suppose so; I do not know of any other.

Q. Of couse you couldn't pay five hundred dollars out of
214 a six thousand dollar draft that was unbroken; is that the way you understand it?

A. I suppose that is it.

Q. This entry here: "One left out, $6,000, A., L. & W."—Do you understand that to refer to the same six thousand dollar draft?

A. I suppose I does.

Q. On your memoranda of September 15?

A. I suppose I did, but I have no distinct recollection.

Defendants' counsel objects to all this understanding of Mr. Wiswall as incompetent.

Q. Do you recollect afterwards, on or about October 3d, after you returned, receiving this letter from Mr. Holbrook, and then handing the balance of the drafts to Mr. Ayres and his coming out here?

A. I do not recollect.

Q. I call your attention to your memoranda on October 3, 1860, and see if that refreshes your memory?

A. Well, sir, all I know is that I do not recollect distinctly.

Q. Is it probable you would have made that entry after you returned to Troy, unless you had had the drafts with you and delivered them there to him?

A. No, sir.

Q. You do not think it is?

A. No, sir.

Q. Do you now think you must have taken the drafts back with you?

A. It would appear so from that; I have no recollection of it.

Q. Did any of these defendants ever claim to you any mistake in this mortgage?

A. No, sir.

Q. At the time you were at Sandusky and Frederick S. Ayers executed this mortgage?

A. No, sir; I think not.

Q. Did he then raise any question as to compounding interest or any excess in the mortgage?

A. No, sir.

Q. You say you thought some person figured the interest at Sandusky?

A. If it was anybody, I presume it was Mr. Ayres' son.

Q. Which son?

A. Eben Ayres.

Q. You have no distinct recollection?

A. No, sir; not any definite recollection; I couldn't swear
215 positively whether it was done there, or at Port Austin.

Q. This memoranda you have looked at was figured down to 1867; how long was that prior to the execution of this mortgage; the time you went to Sandusky to have this mortgage executed?

A. I think it was two years.

Q. Would you have been likely to have taken a computation to have that mortgage made from that was only brought down to 1867?

Objected to, as incompetent.

A. No answer.

Q. Did you notice in examining that paper marked Exhibit "S," to what date the interest was figured?

A. No, I did not.

Q. You came here purposely from the east, did you, to give testimony in this case?

A. I did, sir.

Q. I understood you to be in poor health before you came?

A. Yes, and have been unwell since.

Q. Is it difficult for you to make such a journey and come such a distance?

A. Sometimes I could do it much better than I have this time; I have been quite unwell for two weeks beforehand.

Q. Would it be difficult to come out here again?

A. I couldn't tell, sir.

By Mr. WINSOR: Upon intimation of counsel that he will offer the paper marked Exhibit "S" in evidence hereafter, we would like to have it for the purpose of examining this witness in regard to it while he is here from a great distance for the purpose of giving testimony in this case.

By Mr. ATKINSON: I desire to state that the intimation was made as a mere piece of pleasantry, in answer to the question of the counsel for the complainants that that would be the course taken.

Recross-examination by Mr. ATKINSON:

Q. You say you find a memoranda of October 3 on your diary showing when these drafts were delivered to Mr. F. S. Ayres?

A. It seems so, sir.

Q. Will you produce your memoranda?

[Witness produces book.]

Q. This, then, is the memoranda you find under date of October 3, 1860: "Sent by F. S. Ayres four drafts, dated
216 August 28, 1860, namely: one of $18,000, three of $1,000 each, for the purpose of taking an assignment of the Calvin P. Austin mortgage on the Port Austin property, for my private benefit;" now, from that memoranda, can't you swear positively that the amount given to Mr. Ayres was twenty-one thousand dol-

lars instead of twenty-two thousand dollars—the draft of eighteen thousand dollars and the three of one thousand dollars each making twenty-one thousand dollars?

A. It seems there to me as though it was; but when I brought them out here I brought twenty-two thousand dollars; it would appear those were the only ones given Mr. Ayres.

Q. That would be twenty-one thousand dollars, and that they were given at West Troy instead of being given to him here?

A. From that I should judge they went back to West Troy.

Q. And that you delivered them to him there?

A. I should judge so.

R. In this memoranda of August 28, I find the memoranda to be as follows: "Drafts on New York, payable to E. W.'s order, one of $18,000, three of $1,000, two $500, one left out, $6,000, A. L. & W."; now, do you mean that the whole memoranda was made on the 28th of August?

A. I have no recollection, sir, anything about it.

Q. Didn't you afterwards go back and put in this last line this memoranda, the words "one left out, A., L. & W."?

A. I have no recollection about it; I should suppose it was made at the same time.

Q. Why would you say, "one left out"?

A. I do not know; I have no recollection.

Q. Doesn't that look to you as if you had made a mistake in not putting that in and you afterwards went back and corrected it?

A. I have no recollection about it.

Q. Then you find that this draft of five hundred dollars, which you testified in your direct examination was given to Mr. Ayres, was actually delivered to C. G. Learned, on the 16th of September, and that these other drafts to purchase the Austin mortgage were not delivered to Mr. Ayres until the thirtieth of the next month, October?

A. It would appear that I had taken them back; but as I said, I have no definite recollection about it.

Q. Whose memoronda is this on the back of this draft: "Endorsed in blank, September 6, 1860"?

A. It isn't mine.

Q. Do you know whose it is?

A. No, sir, I do not.

217 Q. Did you use any money while you were west that time?

A. For my own benefit?

Q. Yes.

A. Not that I know of, except my expenses.

Q. I see that you had only thirty-nine dollars when you left home, in cash.

A. Well, sir?

Q. You think you had been out here about a month; now don't you think you used more than thirty-nine dollars?

A. I had no occusion to use any while I was at Port Austin; I didn't have to buy whisky, or cigars, or tobacco, or anything of that kind.

Q. Who furnished it?

A. Mr. Ayres always had a good store of it.

Q. You couldn't say, then, that you do not remember using any money for your personal expenses?

A. No, sir; not at that time.

Q. Was there a six thousand dollar draft at all?

A. From memory I couldn't say.

Q. You have no memory of any six thousand dollar draft?

A. From memory I couldn't say.

Q. Isn't it the fact, instead of a six thousand dollar draft for the company, that you had a five thousand dollar draft for the Company, and either one draft of one thousand dollars or two small drafts of five hundred dollars each?

A. I couldn't say from memory, sir.

Q. You do not recollect?

A. No, sir.

EBENEZER WISWALL.

Subscribed and sworn to before me, this 22d day of October, A. D. 1879.

JAS. A. RANDALL,
Circuit Court Commissioner, Wayne County, Michigan.

218 The following further proofs in this cause were taken before the undersigned, one of the circuit court commissioners in and for the county of Wayne, on Friday, the twenty-fourth day of October, A. D. 1879, commencing at eight o'clock in the forenoon of said day.

JAS. A. RANDALL,
Circuit Court Commissioner, Wayne County, Michigan.

Dated Detroit, October 24, 1879.

EBENEZER WISWALL, a witness heretofore sworn, being recalled for further cross-examination, deposes and says:

By Mr. ATKINSON:

Q. I would like to ask you if you can fix more definitely the time of the loss of the bond and mortgage than you already have?

A. I do not know that I can, sir.

Q. Have you looked at your memoranda to see?

A. I presume my memoranda was in the satchel at the time.

Q. You do not find any memoranda of that date?

A. No, sir; I do not.

Q. What memoranda do you find—of what years?

A. I think I have got the memoranda of most all of those years.

Q. Can't you tell, then, what year of your memoranda is missing?

A. I think the memoranda of 1870 is missing.

Q. The memoranda of 1870?

A. Yes, sir.

Q. Do you remember what time of year you made the trip on which you lost your baggage?

A. I do not.

Q. You had been up to Port Austin and made the trip down with Mr. Ayres that year, hadn't you, in 1870?

A. I do not recollect.

Q. Do you remember being sick at Port Austin, and going through with Mr. Ayres to Bay City?

A. Yes, sir.

Q. And coming down?

A. Yes, sir; I think I went up to Bay City once with Mr. Ayres.

219 Q. And parting with him here—you going home and he going down to Sandusky?

A. I do not recollect whether I parted with him here or not.

Q. Was it on that trip, while you were with Mr. Ayres, you lost your bond?

A. No, sir; I think not; I wouldn't be positive about it; I think not.

Q. Did you visit Port Austin again that season—that year?

A. I do not recollect.

Q. Do you know what time of the year it was you made that trip with Mr. Ayres, whether it was in cold weather or warm weather?

A. My impression is that it was in cold weather, but I wouldn't swear to it.

Q. But you do not find any memoranda of the time at all?

A. I do not.

Q. And your supposition is that your memoranda was lost with the baggage as that time?

A. I suppose it was; I have no doubt of it.

Q. Now, as I understand you, after you had lost your bond and mortgage you communicatrd the fact to them and had this duplicate executed?

A. Yes, sir.

Q. How soon after the loss of your bond and mortgage did you let them know of your loss?

A. My impression is the next time I went up; I think I naturally should have done so;. I presume I did.

Q. And at that time you got the duplicate bond, I suppose?

A. I should think so; I wouldn't swear postively because my recollection doesn't serve me.

Q. That is your supposition—you told them the first time you went up and got the duplicate bond?

A. Yes, sir.

Q. What time did your son Charles leave Port Austin?

A. I couldn't say.

Q. Can you tell with reference to the time you sold out to Mr. Ayres?

A. I suppose he left soon after I sold out to Mr. Ayres.

Q. He was still theee at the time you got the duplicate bond?

A. I wouldn't swear, for I do not recollect.

Q. I see he was a witness to it.

A. I presume he was there.

Q. That duplicate, as you recollect, was executed at Port
220 Austin, wasn't it?—the duplicate bond that you now have?

A. I think so.

Q. About how long after the loss of the bond before you got the duplicate?

A. I cannot tell, sir.

Q. With reference to the money originally advanced on the Austin mortgage, as I understand you lent to the firm the sum, whatever it was—twenty-one thousand dollars or twenty-two thousand dollars, whatever it was, was advanced by you to the firm?

A. That was to take up the Austin mortgage?

Q. Why wasn't the Austin mortgage paid instead of the assignment taken?

A. I do not recollect; I do not suppose the firm had money enough to pay it.

Q. They had, with what they borrowed from you, sufficient to pay it?

A. They never borrowed any money for that purpose, sir.

Q. They borrowed twenty-one thousand dollars or twenty-two thousand dollars?

A. I do not understand it so; I do not understand I lent the firm that.

Q. You understood you advanced that, didn't you?

A. I sent that out here for to take the assignment of the mortgage.

Q. You also sent a sum of money belonging to the firm?

A. My memoranda shows that I took six thousand dollars for the firm.

Q. You do not understand that for that twenty-one thousand dollars, or twenty-two thousand dollars, advanced from your individual funds, that you got the whole mortgage, did you; and that they should have nothing for the amount advanced by the firm?

A. No, sir; I shouldn't suppose so.

Q. Then I suppose the understanding was that the assignment to Catherine Wiswall was to secure the payment of what you advanced yourself?

(Question objected to—the instrument of transfer shows what the agreement was itself.)

Q. Will you answer that question: Was the understanding, then, that the assignment to Catherine Wiswall was to secure the payment of the sum advanced by you to buy the mortgage?

A. The understanding was that the mortgage was to be assigned to Catherine Wiswall.

Q. For what purpose?

221 A. Why, that she should own the mortgage.

Q. That she should own the mortgage, and that the firm should lose the amount that they had paid upon it?

A. No; I do not suppose that they were to lose.

Q. Then was she to own it simply to the extent of what she had paid, or you had paid?

A. The assignment was absolute to Catherine Wiswall.

Q. Was the understanding that she took the entire mortgage absolutely, or that she took that interest in it for which she had paid?

A. Well, I do not recollect distinctly, but I recollect this much——

Q. You didn't intend to give Catherine Wiswall the amount advanced by the firm?

A. I intended to give her the assignment of the mortgage.

Q. Now, supposing she advanced twenty-one thousand dollars, did you intend to give her the mortgage for twenty-five thousand dollars for that twenty-one thousand dollars, and have the firm lose the amount that they had paid?

A. I never intended the firm should lose a dollar by me; I do not think they ever did.

Q. Has the firm ever been reimbursed by Catherine Wiswall for the amount that it paid on that mortgage?

A. I do not know.

Q. You do not know of any such reimbursment; you have done all the business, haven't you, for her?

A. Until it was assigned.

Q. During her life you always did it yourself?

A. Yes, sir.

Q. She never took any personal charge of it?

A. No, sir.

Q. And those funds with which it was purchased was really your own money?

A. I gave it to her.

Q. It came from your funds, I mean?

A. Yes, sir.

Q. And the money that you collected on the mortgage you used in your own business, didn't you?

Objected to, as irrelevant and immaterial.

A. I think I did.

Q. Now, I will ask you again, if the assignment of this mortgage was merely to secure her for the amount that she paid towards this mortgage, or that you paid for her?

A. I suppose it was, sir, the amount that was paid.

222 Q. Whatever that amount might be?

A. Yes, sir.

Q. Where is Charles Wiswall living—your son Charles?

A. Saratoga county, New York.

Q. Do you recollect being at Port Austin for some little time, trying to settle up with Mr. F. S. Ayres, trying to settle up the affairs of your firm as managed by Mr. Learned, in 1870, being at Port Austin for some little time trying to settle up the affairs of your firm with C. G. Learned?

A. I was there at various times, sir.

Q. At one time in particular were you there for some little time examining the books and papers and trying to arrive at a settlement?

A. I think I was a number of times; I do not recollect any one time.

Q. Do you recollect how long you had been there, then, at the time you were sick?

A. No, sir; I do not.

Q. Do you recollect the year you were there trying to settle up those accounts?

A. No, sir; I do not.

Q. Do you recollect calling on Mr. Ayres, at Sandusky, at one time, while he was living there, and telling him in substance that things were going badly at Port Austin and he must go up there?

A. I think I did a number of times.

Q. What year did that conversation occur?

A. I couldn't tell you from recollection, sir, to save my life.

Q. And you cannot tell how soon afterwards he went up?

A. No, sir.

Q. Well, when he went up, you went up there soon afterwards and joined him in making an investigation, were you there when he went up?

A. I couldn't tell you, sir; whether he went up with me or before or after me.

Redirect examination by Mr. WINSOR:

Q. At the time this mortgage was assigned by Mrs. Wiswall to the complainants did the complainants make a power of attorney to you to act for them?

A. The present owners of the mortgage?

Q. Yes, sir.

223 A. I think not; I have no recollection of anything of that kind; I do not know; I couldn't say.

Q. Do you recollect at what place your baggage was lost on the trip you spoke of?

A. At Toledo.

Q. Then you couldn't have been on the trip that you came down with Mr. Ayres, for you parted here and went east from here and he went to Sandusky?

A. I do not recollect.

Q. Do you recollect having lost your baggage on any other trip?

A. No, sir; I didn't lose my satchel; I had some things taken out of my baggage at the Michigan Exchange once.

Q. I do not know whether you understand my question about the power of attorney; do you recollect the time the assignment was made by Mrs. Wiswall, in February, 1874, before her death?

A. I recollect the time the assignment was made.

Q. You were at that time holding a power of attorney to yourself from her?

A. Yes, sir.

Q. Now, do you recollect whether at the time the assignment was made by Mrs. Wiswall to the present owners if they joined in a power to you?

A. I do not recollect, sir.

Q. Do you recollect having a power of attorney from them at any time?

A. I do not, distinctly.

Q. Have you any recollection about when or where the duplicate bond was made after the loss of the original?

A. That was made at Port Austin, to the best of my recollection, sir.

Q. What I desire to know is, if you know anything about the making of it?

A. If I knew anything about it?

Q. Anything about the drawing up of the bond—what it was made from?

A. No, sir; I do not.

Q. You do not know whether it was a duplicate held by the parties or whether it was a new bond made at the time?

A. I do not know anything about it.

Q. In your testimony the other day, in answer to the counsel for the defendant, did you understand him to say that the duplicate was dated after the loss of the other one?

224 A. I did understand him so.

Q. State how it came that James S. Ayres afterwards signed it.

A. After he bought in there, I requested that the parties owning the mill should be on the bond. Mr. Ayres, if I recollect right, said he couldn't sign it only as security. After Mr. Eben. Ayres bought in there, I requested him to, and he declined doing it; I thought that those who held the property ought to sign the bond.

Q. It was the desire on your part to have those procuring an interest in the property sign the bond?

A. Yes, sir.

Q. Then you do not understand his signature there to be a part of the original bond or duplicate?

A. No, sir; I do not.

Recross-examination by Mr. ATKINSON:

Q. How long after the duplicate was made did Mr. James S. Ayres sign it?

A. I couldn't tell you.

Q. Didn't he sign it at the same time it was delivered to you?

A. I think not; I am very sure he did not.

Q. The words "in duplicate" were written across the face of it by James S. Ayres, were they not?

A. I couldn't tell you, because I couldn't see to read it.

Q. Didn't he sign it at the same time he wrote "in duplicate" across it?

A. I couldn't tell anything about it; I presume it was written when the mortgage was first executed. I couldn't swear from memory.

Q. Do you mean to say that you have any recollection of his signing it at a different time from the other obligators?

A. Yes, sir.

Q. Where did he sign it?
A. At Port Austin.
Q. Wasn't it the same trip you got his signature and the others?
A. I think not.
Q. You think it was a still later time?
A. Yes, sir.
Q. Do you know when Mr. James S. Ayres became interested in the property.
225 A. I do not recollect.
Q. Wasn't he interested in the property before you took the original mortgage to Catherine Wiswall?
A. Not to my knowledge.
Q. You didn't know of his interest then if he had any?
A. No, sir; if he was, I didn't know it.

EBENEZER WISWALL.

Subscribed and sworn to before me, this 24th day of October, A. D. 1879.

JAS. A. RANDALL,
Circuit Court Commissioner, Wayne County, Michigan.

Testimony of William McAlpine Wiswall.

WILLIAM MCALPINE WISWALL, a witness produced on part of the complainants, being duly sworn, deposes and says:

By Mr. WINSOR:

Q. Where do you reside, Mr. Wiswall?
A. In Philadelphia, Pennsylvania.
Q. You are one of the complainants in this case?
A. I am, sir.
Q. Have you been acting for the other complainants in the matter of collecting payments on the Catherine A. Wiswall mortgage?
A. I have, sir.
Q. State what payments were made and endorsed upon that mortgage and the bond accompanying it at the time it came into your hands.
A. I couldn't say there have been any endorsements made on the bond at all; I have the impression I didn't endorse them on the bond, but every time I got payments I gave receipts.
Q. The question is, at the time it came into your hands what was endorsed on it?
A. At the time it came into my hands there was an endorsement ment of $8,000 and $10,000.

Objected to, on the ground that the endorsements themselves are the best evidence.

226 Q. To whom have the payments been made since that time?
A. To me, sir.
Q. All made to you?

A. I suppose so, sir; I do not know of any others having been made.

Q. Were a part of those payments made in drafts?

A. They were, sir, part in drafts; I do not know but one or more in notes, note or notes, and some I think in cash.

Q. Some of those payments are stated by you in the bill of complaint at a less sum than the face of the draft; will you state how that happened?

A. Some of them were in drafts or notes, and there was some exchange or collection against them; I couldn't state just now exactly how it was, but from which I deducted the amounts; and there was one draft—I do not know whether there were any others or not—on which that was no collection; that was a twenty-five hundred dollar draft, on which there was no collection; it was an eastern draft.

Q. What sum did you allow upon the payment, and what time did you allow it?

A. Do you mean the deduction?

Q. Yes, sir.

A. I think I can tell from this. (Witness takes a paper from his pocket and examines it.) I think it was on some of them three dollars, and on a note or something a dollar.

Q. The difference between the face of the draft and the amount of the payments as allowed by you is accounted for how?

A. The difference between the face——

Q. Of the draft and the sum allowed?

A. The sum credited?

Q. Yes.

A. Was accounted by me as exchange or collection.

Q. The dates of your credits are the dates you received the money?

A. Yes, sir.

Q. Will you now state how many of those drafts there were that you paid exchange upon?

A. I thought I had that here—Oh, yes, here is one on October second and November third, 1876, which I credited as eleven hundred and ninety-seven dollars; the drafts, I think, were twelve hundred dollars. Also, in 1876, April three and May one, drafts for fifteen hundred dollars each, from which was to be taken the sum of three dollars.

Q. Those are the dates you realized the money?

227 A. I think they are, sir.

Q. On September 5, 1877, was an item of fifty dollars which the defendants claim to have paid on the mortgage; state what that fifty dollars was paid for.

A. Was that in August, sir?

Q. No, September, as testified to by the defendants.

A. It may have been September—I wouldn't be sure about that—I think I have a memoranda. That was given me on account of my expenses to Port Austin and back; I had been up two or three times for the purpose of making collections, having written frequently and not been able to get any money, and I claimed I was

entitled to something in the way of expenses, or towards my expenses, in view of going up myself to make these collections instead of sending it to an attorney; and they agreed to pay that much towards my expenses, and I think a check was sent to me—sent me a check, or gave me a check or the money right there, I am not positive which; I think a check was sent to me; we were there in August, and I think a check was sent to me in a letter.

Q. Paid to you on account of your individual expenses in going up there?

A. On account of my expenses, yes.

Q. About what time did this mortgage come into your hands?

A. As near as my memory serves me, it was about 1874.

Q. Can you state what payments have been made upon it since it came into your hands?

A. I think the first payments were the drafts of April 3, 1876—the draft of fifteen hundred dollars, which I credited fourteen hundred and ninety-seven dollars; on May first a like sum.

Q. Go on and state that.

A. July 27—no, I am wrong, October 2—eleven hundred and ninety-seven dollars; that was twelve hundred dollars; and November 3 a like amount; those were twelve hundred dollar checks, or drafts, I wouldn't be sure which.

Q. What was the next payment?

A. We have then, October 29, 1877, a note I believe of one thousand dollars, which I paid a dollar collection on; nine hundred and ninety-nine dollars I have credited; December 14, 1877, I have credited the twenty-five hundred dollars.

Q. Is there no other payment?

A. Yes; there is another payment, but I haven't it on this memoranda; I thought I had it on here; if I remember rightly I think it was eight hundred dollars; I think there was eight hundred dollars given me, and I think four hundred dollars at the same
228 time, making the sum of twelve hundred dollars; it was all paid me at the same time.

Q. That last item was composed of two items?

A. Yes, of two items; I think they first proposed to give me eight hundred dollars, and afterwards they said they would give me four hundred dollars which they had intended to send my father, but they said they would give it to me.

Q. Has there been any payment since that upon the mortgage?

A. No, sir; that was the last payment.

Q. With whom did you transact the business in regard to these payments?

A. Well, generally at Port Austin with Mr. Ayres himself.

Q. With the defendants Frederick S. Ayres and James S. Ayres?

A. Yes, and I sometimes wrote to Eben Ayres, of Sandusky, about it.

Q. Have they ever given you any statement of the amount of payments made on that mortgage?

A. No, sir, only in one instance; that was at the time they wrote for a statement of the interest, a statement of the amount due upon

the mortgage; they gave me the amount of the mortgage, named the amount of the mortgage, and the date of it, and the two payments that had been made on it of eight thousand dollars and ten thousand dollars.

Q. Will you look at that paper, marked Exhibit "N," and state whether that is the statement rendered to you you have spoken of.

(Paper handed witness.)

A. Yes, sir.

Q. In whose handwriting is that?

A. I should think James Ayres'.

Q. Did defendant Frederick S. Ayres, or James S. Ayres, at any time during your transaction with them in regard to this mortgage claim that any other payments were made upon it?

A. Never, sir; I never heard anything at that time or since, excepting since this suit was commenced.

Q. You never heard anything of any such claim until after this suit was commenced?

A. No, sir.

Q. Did the original bond and mortgage come into your hands at any time?

A. No, sir.

Q. Have you any knowled what became of it?

A. I haven't, sir.

229 Q. Will you look at this paper marked Exhibit "B"; was there ever any claim made by the defendants Frederick S. and James S. Ayres that payments had been made prior to the date endorsed upon that duplicate bond?

A. I never heard any, sir, until, as I say, after this suit was commenced.

Q. In your transactions with the defendants Frederick S. and James S. Ayres, receiving these payments, what paper did you treat as the obligation upon which they were making payments?

A. This duplicate bond and mortgage—this duplicate bond and copy of the mortgage.

Q. This paper is the one you always brought with you when you were transacting your business?

A. I cannot say as I always brought them with me; I do not know as I always brought them with me, sir.

Q. Have you the original assignment of the Catherine A. Wiswall mortgage?

A. I haven't, sir.

Q. Were you present at the time it was executed?

A. The assignment?

Q. Yes.

A. No, sir; you speak now of the assignment to my mother.

Q. The assignment of Catherine A. Wiswall to yourself?

A. That I have possession of? Yes, sir.

Q. But you were not present as the execution?

A. No, sir. When you first spoke I thought you referred to the assignment to her.

Cross-examination. By Mr. ATKINSON:

Q. You have stated about all that occurred between you and the defendants when the payments were made, have you?

A. I think I have, sir; I couldn't say all that occurred.

Q. Substantially all that occurred about the payments at the time they were made?

A. I believe I have.

Q. The sum total of it was they gave you so much money to apply on the mortgage?

A. Yes, sir.

Q. You didn't have the duplicate bond with you at the time payments were made, usually?

A. Not always.

230 Q. Can you tell any one payment which was made when you had them with you?

A. No, sir.

Q. Do you remember any one occasion?

A. No, sir.

Q. Do you remember your taking it there on any occasion?

A. I am very sure that when I first had this matter in charge I brought them out with the other papers, with the power of attorney.

Q. Did you ever show it to Mr. Ayres?

A. That I cannot say.

Q. And you have no memory of ever showing it to him?

A. No, sir; I cannot say as to that.

Q. Did you ever ask them if there had been any previous payments made?

A. I think I have; in fact, they told me; I couldn't say positively, sir, about it.

Q. The matter never came to your mind so as to excite your curiosity, or cause you to ask such a question, I suppose?

A. No, sir; because it was given to me by my father the amounts that had been paid when the mortgage was turned over to me.

Q. Your father had previously made all the collections that had been made upon the mortgage?

A. Yes, sir.

Q. Do you know of your own knowledge whether, during your mother's ownership of the mortgage, your father had acted as her agent in making the collections, or did she do the business herself?

A. He did the business.

Q. Do you know whether that was done by her authority?

A. I think he had power of attorney from her.

Q. And he had full power to receive payments on the mortgage?

A. He did, sir.

Q. Did your father have possession of this bond and mortgage?

A. I presume he had; I have no knowledge.

Q. Have you ever seen the original?

A. I do not know as I ever saw it.

Q. That was made about the time of your mother's death, Mr. Wiswall?

A. What is that?
Q. The assignment from her to you?
A. Sometime previous; I do not know how long.
Q. Do you know how long it was?
231 A. No, sir; I do not.
Q. When did your mother die?
A. Some time, I think, in the same year; I have no record of that, sir.
Q. By whom was this assignment delivered to you?
A. I think the assignment was delivered to me by father, he having had it for some time afterwards.
Q. Was it delivered to you before or after your mother's death?
A. It came into my possession, I think, very soon after; I know I took it to Port Austin and had it recorded.
Q. Soon after what?
A. Soon after her death, though I am not positive of that.
Q. Do you remember ever seeing it before she died?
A. Yes, I saw it, I am sure.
Q. Who had it then?
A. I think father had it in his possession.
Q. Why didn't you get it then?
A. Because I had no business out here and had no occasion to use it at that time, and he kept it for some time, and had power of attorney from us to act for us, my brother and sisters.
Q. He held it, then, for you and your brothers and sisters?
A. Yes, sir; he did, and was acting through power of attorney for us.
Q. Did you pay anything for this mortgage?
A. Well, I do not know that I can say that I ever paid any cash for it.
Q. What I want to get at is, whether you paid any money, or whether it was a voluntary gift from your mother?
A. It was a gift.
Q. That was so as to all the defendants?
A. Yes, sir.
Q. None of them paid any money consideration?
A. I couldn't say only as to myself.
Q. You never heard of any such payment?
A. I never heard of any.
Q. I suppose you understood it to be a gift from her to her children?
A. I looked upon it as such; yes, sir.
Q. At the time this assignment was delivered to you, the bond wasn't delivered—the original bond?
A. No, sir.
Q. What paper is this you call a duplicate bond?
232 A. I presume it is a copy of the bond; it seems to have been made out in Port Austin.
Q. Why do you say it is a duplicate?
A. I judge so, because it is endorsed across the face as a duplicate in the handwriting of Mr. Ayres.

Q. Then you know nothing except what it proves itself?

A. That is all, sir.

Q. Do you know whether on the original bond these words, "as security, J. S. Ayres," were signed?

A. No, sir; I do not.

Q. When did you get this duplicate?

A. It came into my possession at the time I took charge of the matter.

Q. At the time the assignment came to you?

A. Yes, the same time I got the assignment; that I believe to be the case.

Redirect examination by Mr. WINSOR:

Q. You state in your cross-examination you never said anything to them about their payments; they did furnish you this statement of the payments made?

A. Yes, sir; a statement with the same amounts.

Q. This was furnished you after the mortgage came into your hands, Exhibit "N"?

A. Yes, sir.

Q. Did you, in compliance with the request made in Exhibit "N," furnish them a statement?

A. I did, sir.

Q. In whose handwriting is the last endorsement of payment on Exhibit "B" made?

A. It looks to me like Mr. James S. Ayres' handwriting.

Q. The signature is whose?

A. Eben Wiswall, my father's.

Recross examination by Mr. ATKINSON:

Q. Then on Exhibit "B" you find an endorsement made to you?

A. The $8,000 and $10,000.

Q. The payments made to yourself?

A. No, sir.

233 Q. You haven't endorsed them?

A. No, sir.

Q. Have you endorsed them on any paper?

A. I gave receipts for them, I think.

Q. Did you endorse them on any paper, mortgage, or bond?

A. Not on any of those papers; no, sir.

Q. Did you ever have any talk at all with Mr. F. S. Ayres about the payments?

A. Yes, sir.

Q. What was the substance of that conversation?

A. Well, I suppose you mean particularly just before the suit?

Q. I do not mean anything of the kind; what was the subject of your conversations, commencing with the earliest one?

A. I couldn't say as to that; I couldn't say as to the commencing with the earliest one; I had conversations with him probably frequently.

Q. In substance merely what you have stated?
A. Yes, I think so.
Q. This statement, you say, is in James S. Ayres' handwriting?
A. I should think it was, sir.
Q. Do you know when Mr. James S. Ayres came into that firm?
A. I do not know, sir.
Q. Do you remember what time?
A. No, sir; I wasn't there.
Q. Have you ever had any written statement from Mr. F. S. Ayres, as to the payments?
A. No, sir; I think not.
Q. What time did you leave Port Austin; you were there for a while, I believe.
A. I should think probably 15 years ago; pretty near that time.
Q. That would be about 1864; was Mr. James S. Ayres a member of the firm then?
A. Not that I know of.

The signature of this witness to his deposition was waived by consent of counsel.

JAS. A. RANDALL, *Commissioner.*

234 *Testimony of De Witt C. Holbrook.*

DE WITT C. HOLBROOK, a witness produced on part of the complainants, being duly sworn, deposes and says:

By Mr. WINSOR:

Q. Where do you reside?
A. City of Detroit.
Q. Did you reside here in 1860?
A. Yes, sir.
Q. Do you know Calvin P. Austin?
A. Yes, sir; I know Ebenezer Wiswall; I know Charles G. Learned, and Frederick S. Ayres, and James S. Ayres.
Q. Do you recollect the time the Calvin P. Austin mortgage was purchased by Mrs. Wiswall?
A. Yes, sir.
Q. Will you state the circumstances of the purchase as you recollect them?
A. I had placed in my hands, in 1857, a mortgage given by William A. Howard, Rollin C. Smith, and Alfred A. Dwight, to foreclose. I filed a bill, in 1857, in the circuit court for the county of Sanilac, in chancery, to foreclose that mortgage. Afterwards, as I understood, Messrs. Ayres and Learned bought the premises of Mr. Read, who owned a fee in the premises, subject to this mortgage. Mr. Read had foreclosed a subsequent mortgage upon those premises and got the title. It was proposed in some way, I do not know what the object was, but they would take an assignment of this mortgage and would pay Mr. Austin his money. It was a subject of negotiation for some time. There was a dispute as to the amount due upon this mortgage given to Mr. Austin, and the only way to

settle it, as I understood, was a law-suit, and that was to carry on that foreclosure suit; but in the meantime this money was advanced by, as I supposed, Mrs. Wiswall. I didn't know until within the last few months that any of this money was advanced by Ayres, Learned and so on; I supposed it was all advanced by Mrs. Wiswall; at all events, I made an assignment of the mortgage given by Howard, Smith, and Dwight to Mrs. Wiswall. Mr. Wiswall and Ayres had been in my office and talked the matter over, I think, several times; at all events it became familiar to us all, and in order that the parties advancing this money might be secured by this mortgage, an assignment of it was made and put in the hands of Kirkland C. Barker for the benefit of all the parties; the exchange of the papers was made by Mr. Ayres in my office, and the money, $25,000, I cannot tell the exact dollar, the papers
235 show, but I cannot state it; I cannot exactly remember the exact amount; Mr. Ayres, on the 6th day of October, 1860, paid to Mr. Penniman, E. J. Penniman, as agent of Mr. Austin, $25,543.22; Mr. Ayres and I went to Mr. Barker with that assignment and left it with Mr. Barker, and about which the contract was made at the time to understand the transaction.

Q. I will question you with reference to Exhibit "D," the signature there.

A. That is wholly in my handwriting, with the exception of the signatures, and I signed it for Mr. Austin; Mr. F. S. Ayres had signed it for Catherine A. Wiswall, and the receipt annexed to it is signed by Mr. Penniman himself.

Q. Was there a balance due upon that mortgage over and above the part assigned to Mrs. Wiswall?

A. Yes; there was a balance of $501.22, principal, and the interest on it was for eleven years and four months, at ten per cent., or $576.80, making in all $1,069.02; that was paid to me by Mr. Ayres, and $45.46 costs, in addition, making $1,119.58, on the 23d day of November, 1870; I then gave Mr. Ayres a receipt, stating that Mr. Austin's interest in that mortgage was fully paid; that balance was due, and I insisted upon its payment by somebody, and I didn't care who; I wouldn't give a receipt until somebody paid it to me, and Mr. Ayres paid it to me.

Q. Can you state the date of that assignment made by Calvin P. Austin to Catherine A. Wiswall?

A. No, sir; I cannot tell it from my own knowledge; I received that from Mr. Austin about the 25th or 26th of September, at the time I wrote that letter; I must have received it probably the same day or the day before; it was sent to Vermont to be executed. [Witness produces a paper.] I think I sent that assignment to Mr. Austin in August to be executed, and I didn't get it back until about the time I wrote that letter, about the 25th or 26th of September; it was dated, I think, in August.

Q. Have you a copy, Mr. Holbrook, of the Austin assignment, made by a clerk in your office at the time or about the [time] of the acknowledgment?

A. I have a copy in lead pencil, in the handwriting of Frederick E. Driggs, who was a clerk in my office.

Q. Has the copy Austin's signature to it, or is it without signature?

A. It is signed C. P. Austin.

Q. Dated?

A. The first day of September, 1860.

[The paper is marked Exhibit "J" for identification.]

236 Q. Who was the solicitor who had charge of the foreclosure proceedings under the Calvin P. Austin mortgage?

A. I had the entire control.

Q. Through to the time of the sale?

A. Yes, sir.

Q. Was there ever any money paid to you other than the $1,100 you have spoken of as solicitor in the case, the proceedings for the sale of the property under the mortgage?

A. No, sir; at the time there was no money paid to me as arising from the sale of the property; I only claimed for Mr. Austin there was a balance, and this balance was paid by Mr. Ayres; that was all the money that Mr. Austin claimed out of this mortgage over and above the twenty-five thousand dollars that was paid.

Q. From the time that Mr. Austin assigned that mortgage to Mr. Wiswall were you conducting the foreclosure sale for Mr. Austin, or were there other parties directing and calling for the foreclosure?

A. I was foreclosing it in the first place for Mr. Austin to get his money; in the next place for the benefit of Ayres and Learned, that the title of the property might be made to them, to cut off anything that might possibly exist; Mr. Austin was my client and he paid me for the services entirely.

Q. Who was the member of the firm of Ayres, Learned & Wiswall that had the interviews with you and did the business in regard to having the mortgage foreclosed and the foreclosure completed and the sale made?

A. Frederick S. Ayres, Charles E. Learned, and Ebenezer Wiswall.

Q. I mean who was the particular member that did the business and had the interviews with you in regard to having the sale brought about?

A. I think I had more to do with Mr. Ayres probably than any other person who acted for them.

By Mr. ATKINSON:

Q. You had interviews with all of them about it?

A. I couldn't say I had interviews with Mr. Learned; I had interviews with Mr. Ayres and Mr. Wiswall; I do not know anything about Mr. Learned; I do not remember him; I may have had interviews with him.

By Mr. WINSOR:

Q. Do you recollect having any interview with Mr. Wiswall after the assignment of the Calvin P. Austin mortgage, prior

237 to the foreclosure sale, or between the assignment and the foreclosure sale?

A. I did have interviews with him, because he was anxious this sale should be made and as early as possible, and I had interviews with him quite often; the sale wasn't made until 1868, and the money was paid to Mr. Austin in 1860.

Q. The sale was made in 1869?

A. I do not know; the sale was entered May 6, 1868.

Cross-Examination by Mr. ATKINSON:

Q. Who acted for you at Lexington?

A. I may have written to Divine & Wixson, if I wrote to anybody at all; if I wrote to them it was merely a matter of information.

Q. From 1860 to 1869, when the sale was made, the proceeding was really conducted for the accommodation of the firm of Ayres, Learned & Wiswall, so as to give them the mortgage title?

A. The object of it was to give them the mortgage title, and Mr. Austin to claim what he insisted upon as a further amount due upon this.

Q. To determine that little balace of five hundred dollars and the interest?

A. Yes, sir; I will state that when this money was paid to me it is my impression that I gave an order and sent it to Mr. Barker to deliver up this assignment of the mortgage to Mr. Ayres; I gave the consent to somebody, and I have no recollection of having any interview on the subject with anybody but Mr. Ayres; directed to Mr. Barker, that he might deliver up that assignment to Mr. Wiswall or Mr. Ayres.

Q. Will you look at that and see if that is the paper you gave Mr. Ayres?

[Paper handed witness.]

A. Yes, sir; and this is the check.

Q. That is the check you received for the balance?

A. Yes; and for which I gave that receipt.

The papers referred to by the witness are offered in evidence, and are hereto annexed, marked Exhibits "U" and "V" respectively.

Q. This is the paper you referred to, then, in your previous statement?

A. Yes, sir.

238 Q. And the check marked "U" is the check delivered to you by Mr. Ayres, and on which you got the balance you spoke of—the eleven hundred dollars?

A. Yes, sir.

D. C HOLBROOK.

Subscribed and sworn to before me, this 22d day of October, A. D. 1879.

JAS. A. RANDALL,
Circuit Court Commissioner, Wayne County, Michigan.

The following further proofs in the above entitled cause were taken before the undersigned, one of the circuit court commissioners in and for the county of Wayne, on Thursday, the 23d day of October, A. D. 1879, commencing at nine o'clock in the forenoon of said day.

JAS. A. RANDALL,
Circuit Court Commissioner, Wayne County, Michigan.

Dated Detroit, October 23d, 1879.

Testimony of Charles B. Hull.

CHARLES B. HULL, a witness produced on the part of the complainants, being duly sworn, deposes and says:

By Mr. WINSOR:

Q. Where do you reside?

A. In the city of Detroit.

Q. How long have you resided here?

A. I was born here.

Q. You have been connected with the late K. C. Barker in business?

A. Yes, sir.

Q. Were you one of his executors?

A. No, sir, I am not one of his executors; Mrs. Barker was the sole executor, I believe.

239 Q. Have you had the custody and charge of the papers belonging to K. C. Barker?

A. Yes, sir; I know of his private matters.

Q. Have you made search among the papers of K. C. Barker for an assignment of a mortgage from Calvin P. Austin to Catharine A. Wiswall, at the request of Mr. Holbrook?

A. I have so done.

Q. Have you been able to find upon such search that assignment among his papers?

A. I have not.

Q. Have you looked for it among the papers where such an assignment would be likely to be found?

A. I have.

CHARLES B. HULL.

Subscribed and sworn to before me, this 23d day of October, 1879.

JAS. A. RANDALL,
Circuit Court Commissioner, Wayne County, Michigan.

Testimony of Walter Ingersoll.

WALTER INGERSOLL, a witness produced on part of the complainants, being duly sworn, deposes and says:

Q. Mr. Ingersoll, have you examined those drafts marked "R"?

A. Yes, sir; I have looked at them.

Q. Have you seen those drafts before?

A. I think I must have seen them.
Q. Do you recognize your signature upon them?
A. Yes, sir.
Q. Upon all of them?
A. All of them.
Q. In what capacity were you acting at the time your signature was made?
A. Assistant cashier of the Michigan Insurance Bank?
Q. Did those drafts pass into that bank?
A. Yes, sir.

240 Cross-examination:

Q. What are those pencil marks on the back of those drafts?
A. I do not know, sir; I couldn't tell; it is only a supposition; I suppose that to be made by the Bank of the City of New York, or the Albany City Bank, the Bank of the City of New York, where they were paid, or Park Bank possibly, and having been paid in the month of October; I suppose that is the meaning of this; it is a mere supposition; I have no knowledge on the subject.
Q. You think it is the mark made by the paying bank at the date of payment?
That would be my impression.

WALTER INGERSOLL.

Subscribed and sworn to before me, this 23d day of October, A. D. 1879.

JAS. A. RANDALL,
Circuit Court Commissioner, Wayne County, Mich.

The examination is adjourned, with the privilege of further examining Mr. Ingersoll, until Thursday, the thirtieth day of October, A. D. 1879, at ten o'clock sharp, in the forenoon of said day, at which time Mr. Ingersoll appeared and was not further examined.

JAS. A. RANDALL,
Circuit Court Commissioner, Wayne County, Mich.

241 EXHIBIT Q.

Catherine A. Wiswall to Charles E. Wiswall et al.

Received for record June 2, 1874, at 10½ o'clock a. m.
RICHARD SMITH, *Register.*

Know all men by these presents, That I, Catherine A. Wiswall, of the village of West Troy, Albany county, N. Y., of the first part, in consideration of the sum of one dollar, to me in hand paid by Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do grant, bargain,

sell, assign, transfer, and set over unto the said parties of the second part, a certain indenture of mortgage, bearing date the 27th day of January, in the year one thousand eight hundred and sixty-nine, made by Frederick S. Ayres, Nancy Ayres, his wife, Charles G. Learned, and Maria Learned, his wife, and Ebenezer Wiswall, and which said mortgage was recorded in the register's office of Huron county, Mich., on the 11th day of March, in the year 1869, in Book of Mortgages No. C, at page 240, &c., together with the bond or obligation therein described, and the money due or to grow due thereon, with the interest:

To have and to hold the same unto the said parties of the second part for their use and benefit, subject only to the proviso in the said indenture of mortgage mentioned. And I do hereby make, constitute, and appoint the said parties of the second part my true and lawful attorneys, irrevocable in my name or otherwise, but at their own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of said money and interest; and, in case of payment, to discharge the same, as fully as I might or could do if these presents were not made.

And I do hereby covenant to and with the said parties of the second part that there is now due and owing upon said bond and mortgage the sum of ——— dollars and ——— cents, with interest from the ——— day of ———, 18—, and that I have a good right to sell and assign the same as aforesaid.

In witness whereof, I have hereunto set my hand and seal,
242 this twenty-fifth day of February, in the year one thousand eight hundred and seventy-four.

her
CATHARINE x WISWALL.
mark.

Sealed and delivered in the presence of—
GEO. Y. LEARNED.
GEORGE L. POLLOCK.

STATE OF NEW YORK, } ss:
Rensdlaer County, }

On the twenty-fifth day of February, one thousand eight hundred and seventy-four, before me, a commissioner for the State of Michigan, appeared Catherine A. Wiswall, to me well known to be the person described in and who executed the within assignment, and acknowledged that she executed the same.

A. G. HALSTED, [SEAL.]
Commissioner for the State of Michigan, Troy, N. Y.

243 EXHIBIT R.

STATE OF NEW YORK.

No. 3542. BANK OF WEST TROY, WEST TROY, *Aug't* 28, 1860.
The Park Bank in New York: Pay to the order of E. Wiswall, Esq., five hundred dollars.
$500. G. B. WILSON, *Cashier.*

Indorsed on back as follows: (Bank of the State of New York, Paid.) Eben. Wiswall, Detroit. Pay H. H. Martin, Esq., cashier or order. W. Ingersoll, as't cashier. Pay Bank of the State of New York, or order. H. H. Martin, cashier. Sep., '60.

STATE OF NEW YORK.

No. 3543. BANK OF WEST TROY, WEST TROY, *Aug't* 28, 1860.

The Park Bank in New York: Pay to the order of E. Wiswall, Esq., five hundred dollars.

$500. G. B. WILSON, *Cashier.*

Endorsed on the back as follows: (Bank of the State of New York, paid.) Pay to the order of C. G. Learned. Eben. Wiswall. Chas. G. Learned. Pay H. H. Martin, Esq., cashier, or order. W. Ingersoll, as't cashier. Pay Bank of the State of New York, or order. H. H. Martin, cash. Oct., '60.

244 STATE OF NEW YORK.

No. 3544. BANK OF WEST TROY, WEST TROY, *Aug't* 28, 1860.

The Park Bank in New York: Pay to the order of E. Wiswall, Esq., one thousand dollars.

$1,000. G. B. WILSON, *Cashier.*

Endorsed on the back as follows: (Bank of the State of New York, paid.) Pay to the order of F. S. Ayres. Eben. Wiswall. F. S. Ayres. Pay H. H. Martin, Esq., cashier, or order. W. Ingersoll, as't cashier. Pay Bank of the State of New York, or order. H. H. Martin, cashier. Oct., '60.

STATE OF NEW YORK.

No. 3545. BANK OF WEST TROY, WEST TROY *Aug't* 28, 1860.

The Park Bank in New York: Pay to the order of E. Wiswall, Esq., one thousand dollars.

$1,000. G. B. WILSON, *Cashier.*

Indorsed on the back as follows: (Bank of the State of New York, paid.) Pay to order of F. S. Ayres. Eben. Wiswall. F. S. Ayres. Pay H. A. Martin, Esq., cashier, or order. W. Ingersoll, as't cashier. Pay Bank of the State of New York, or order. H. H. Martin, cashier. Oct., '60.

245 STATE OF NEW YORK.

No. 3546. BANK OF WEST TROY, WEST TROY, *Aug't* 28, 1860.

The Park Bank in New York: Pay to the order of E. Wiswall, Esq., one thousand dollars.

$1,000. G. B. WILSON, *Cashier.*

Endorsed on the back as follows: (Bank of the State of New York, paid.) Pay to the order of F. S. Ayres. Eben. Wiswall.

F. S. Ayres. Pay H. H. Martin, Esq., cashier, or order. W. Ingersoll, as't cashier. Pay Bank of the State of New York, or order. H. H. Martin, cashier. Oct., '60.

STATE OF NEW YORK.

No. 3547. BANK OF WEST TROY, WEST TROY, *Aug't* 28, 1860.

The Park Bank in New York: Pay to the order of E. Wiswall, Esq., eighteen thousand dollars.

$18,000. G. B. WILSON, *Cashier.*

Indorsed on the back as follows: (Bank of the State of New York, paid.) Pay to the order of F. S. Ayres. Eben. Wiswall. F. S. Ayres. Pay H. H. Martin, Esq., cashier, or order. W. Ingersoll, as't cashier. Pay Bank of the State of New York, or order. H. H. Martin, cashier. Oct., '60.

246 EXHIBIT "J"

To D. C. Holbrook's Evidence.

Know all men by these presents, that I, Calvin P. Austin, of Brandon, Vermont, of the first part, for and in consideration of the sum of twenty-five thousand four hundred and 26-100 dollars, lawful money of the United States of America, to me in hand paid by Catherine A. Wiswall, of West Troy, New York, of the second part, at or before the ensealing or delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said party of the second part a certain indenture of mortgage, bearing date the tenth day of November, one thousand eight hundred and fifty-three, made by Rollin C. Smith, Alfred A. Dwight, and William A. Howard, to me, the said Calvin P. Austin, and recorded in the register's office of the county of Sanilac, State of Michigan, in liber one of mortgages, at pages 267 and 268, with all and singular the premises therein mentioned and described, together with the bond or obligation therein also mentioned, and the moneys now due, and the interest that may hereafter grow due thereon:

To have and to hold the same unto the said party of the second part, her heirs and assigns, forever, subject only to the proviso in the said indenture of mortgage mentioned. And I do hereby authorize and appoint the said party of the second part her true and lawful attorney, irrevocable in my name or otherwise, but at her proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the sum or sums of money now due and owing, or hereafter to become due and owing, upon the said bond and mortgage; and, in case of payment, to give acquittance or other sufficient discharge as fully as I might or could do if these presents were not made. And I do hereby, for myself, my heirs, executors, and administrators, covenant, promise, and agree, to and with
247 the said party of the second part, that there is now due upon the said bond and mortgage the sum of twenty-six thou-

sand seven hundred and sixty-nine dollars and seventeen cents, and the interest thereon at the rate of ten per cent. per annum from August fourth, A. D. 1859, and that I have good, right, and lawful authority to grant, bargain, and sell the same in manner aforesaid.

Sealed and delivered, the first day of September, 1860.

CALVIN P. AUSTIN. [L. S.]

In presence of—
A. A. NICHOLSON.
G. H. CRAINE.

248 *Defendants' Testimony.*

To the Circuit Court for the County of Huron. In Chancery.

The following proofs in the above entitled cause were taken before the undersigned, one of the circuit court commissioners in and for the county of Wayne, on the part of the defendants, on Friday, the seventh day of November, A. D. 1879, commencing at 2.30 o'clock in the afternoon of said day.

JAS. A. RANDALL,
Circuit Court Commissioner, Wayne County, Michigan.

Dated Detroit, November 7, 1879.

Testimony of James S. Ayres.

JAMES S. AYRES, one of the defendants, produced in his own behalf, being duly sworn, deposes and says:

By Mr. ATKINSON:

Q. Mr. Ayres, you are a member of the firm of Ayres & Co?
A. I am.
Q. And one of the defendants in this case?
A. I am.
Q. What time did you become interested in the property described in the bill of complaint?
A. March 8, 1870.
Q. That is the date of the contract introduced between Frederick S. Ayres—
A. The date of the execution of the contract between my father and myself, Frederick S. Ayres and myself.
Q. Do you recollect the execution of what is called the duplicate bond in this case?
A. I do.
Will you state when that occurred, with reference to the time you became interested in the property?
A. About one year afterwards.
Q. Had you any knowledge of the payments that had been made upon the mortgage before you became interested?
A. I had not.
Q. Had taken no interest in that matter?
A. I had not.

249 Q. Do you recollect writing the letter introduced as an

exhibit, Jan. 1, 1876, giving a statement of the payments, Exhibit "N"?

[Paper handed witness.]

A. Yes, sir; I wrote that.
Q. Will you state what payments you included in that?
A. I included payments in that after I became interested.
Q. Made after you became interested?
A. Yes, sir; and made by myself.
Q. Did you include any others?
A. I did not.
Q. Did you ever see the original bond in this case?
A. Not to my recollection.
Q. When did you first hear of the original bond being lost, with reference to the time of the execution of the duplicate bond?
A. I think it was at the same time, or about the same time; it might have been a few days before; but I think it was about the same time.
Q. Where was that bond executed?
A. In Port Austin.
Q. Was Mr. Wiswall there at the time?
A. He was.
Q. As you recollect it, was it on that trip of Mr. Wiswall's to Port Austin that you first learned of the loss of the original bond?
A. I think it was; I think it all came out in connection with the execution of that duplicate bond. I had a conversation with him about losing it at the time.
Q. Do you know anything about the $3,000 note mentioned by your father in his testimony in this case; have you ever seen it?
A. I have seen the note.

Objected to by complainants' solicitor, for the reason he has not been permitted to examine the original note.

Q. Will you look at that and see if it is the note referred to?

[Paper handed witness.]

A. Yes, sir.

[Marked "Defendant's Exhibit 1, Randall."]

Q. Do you recognize the handwriting to that note?
A. I do.
Q. By whom was it drawn—the body of the note?
A. The body of the note is written by Mr. Van Woert, the book-keeper of the firm of Ayres & Wiswall.
Q. By whom is it signed?
A. It is signed by Frederick S. Ayres; the name F. S. Ayres is signed by Frederick S. Ayres.
250 Q. Do you recognize the endorsement upon the note of Ayres, Learned & Wiswall?
A. I do.
Q. By whom was that written?

A. Eben Wiswall, Sen.

Q. The same party who was acting as the agent of Catherine Wiswall, or making collections for her at that time, the father of William Wiswall?

A. Yes, sir.

Q. And the same party who got the duplicate bond?

A. Yes, sir.

Q. Do you recognize the other handwriting upon the back of the note?

[Paper handed witness.]

A. I do.

Q. Whose handwriting is that?

A. G. B. Wilson's, of the bank of West Troy.

Q. What are the papers attached to the note?

A. The first paper is a letter of Wiswall, Learned & Co.

Q. By whom was that written?

A. The body is in Van Woert's handwriting, the book-keeper.

Q. By whom was the signature made?

A. It was signed "Ayres & Wiswall," by Frederick S. Ayres.

Q. What is the other paper attached?

A. The back of the letter is an endorsement or memoranda made by cashier Wilson.

Q. What is the other paper?

A. The next paper is a letter of cashier Wilson to Ayres, Learned & Wiswall, in answer to the first letter, and an endorsement or memoranda at the bottom in cashier Wilson's handwriting.

The papers testified to by the witness are offered in evidence, and are attached hereto marked "Defendants' Exhibit 1, Randall."

The papers marked "Defendants' Exhibit 1, Randall," are objected as immaterial.

Q. Were you acquainted with the manner of doing business of Ayres, Learned & Wiswall, the keeping of their books?

A. I was.

Q. Do you know what their custom was as to charging any amount that was paid any of the partners on their partnership account, whether it was customary to charge it at the time it was paid?

Objected to, as immaterial what their custom was.

A. It was their custom to charge it at the time.

251 Q. Will you state whether or not this note of March 8, 1870, was charged to Eben Wiswall at the time it was given to him?

Objected to, as incompetent and immaterial; the books are the best evidence, whether it was charged or not.

A. It was not.

Q. Do you recollect your father's testimony in this case?

A. I do.

Q. And his coming away from their with your father?
A. I do.
Q. Now, will you state about how long after that it was before he applied to you for the duplicate bond?
A. The following spring or summer; that would be the spring or summer of 1871.
Q. Mr. Ayres, do you know anything of a tender bring made in this case?
A. I do.
Q. Where was it made?
A. In the office of the Second National Bank, in the city of Detroit.
Q. By whom was it made?
A. By Allan Shelden.
Q. To whom?
A. Richard Winsor, solicitor for the complainants.
Q. When?
A. June 12, 1879.
Q. What amount was tendered?
A. Twenty thousand two hundred and eighty-eight dollars.
Q. In what kind of currency?
A. In United States legal tender notes.
Q. What did Mr. Winsor say when it was tendered?
A. That he wasn't authorized to accept it; we gave him notice the tender would remain there for ten days; he thought that wasn't hardly time enough to communicate with his clients; and that we had better make it twenty days, and we consented to twenty days, and at or before the expiration of twenty days we gave him notice that the tender would be kept good.
Q. Has it been kept good?
A. It has.
Q. It still remains in the hands of Allan Shelden?
A. Yes, sir; Frederick St. Johns Lockwood and Allen Shelden.
Q. Subject to the call of the mortgagees?
A. Yes, sir.
Q. To whom did you give that notice?
252 A. To Richard Winsor, solicitor for complainants.

By Mr. ATKINSON:

Mr. Winsor, will you produce that notice?

By Mr. WINSOR:

I have no notice of any tender being in the hands of Frederick St. Johns Lockwood; I have a notice of the tender being in the hands of Allen Shelden.

By Mr. ATKINSON:

Will you produce that notice?

By Mr. WINSOR:

I haven't it here; it may be among my files at the hotel.

By Mr. ATKINSON:

Q. Was this tender made after this suit was commenced?

A. Yes, sir.

Q. And the Mr. Winsor to whom it was made is the same who is the complainants' solicitor in this case?

A. He is.

Cross-examination by Mr. WINSOR:

Q. You claim this note was given as a payment on the Catherine A. Wiswall mortgage?

A. I do not.

Q. Don't you know that this note was charged to Ebenezer Wiswall upon the books of Ayres, Learned & Wiswall, in his private account?

A. I do.

Q. At what sum?

A. Three thousand dollars.

Q. What portion of the face of this note was deposited to the credit of Ebenezer Wiswall at the bank of West Troy?

A. I can tell by referring to the letter.

Q. Look and see.

A. Two thousand nine hundred and thirty-four dollars and eighty-three cents.

Q. Did that item of three thousand dollars upon his account stand so charged at the time he sold his interest in the property of Ayres, Learned & Wiswall to Frederick S. Ayres, one of the defendants?

A. It did, because it wasn't discovered until afterwards; it didn't come to the knowledge of Frederick S. Ayres until after that time.

Q. Did Frederick S. Ayres, one of the defendants, afterwards and in pursuance of this contract of purchase, settle that account of Ebenezer Wiswall? 253

A. I know nothing further than what Mr. Ayres has testified; I wasn't present when the contract was drawn.

Q. You are now a member of the firm of Ayres & Co.?

A. Yes, I have so stated.

Q. And successors in business to Ayres, Learned & Wiswall?

A. No, sir.

Q. Successors in business to Ayres, Learned & Wiswall, through the intermediate firm of Ayres & Learned?

A. Yes, in this way: Ayres & Company succeeded Ayres, Learned & Company; and Ayres, Learned & Company succeeded Ayres, Learned & Wiswall.

Q. And your firm has possession of the books and assets of Ayres, Learned & Wiswall, passing through the firm of Ayres, Learned & Co.?

A. Not entirely. I can answer, that some of the assets of the Company were the assets of Ayres, Learned & Wiswall.

Q. You have the books and accounts?

A. Yes, sir.

Q. And have collected from time to time the accounts due to the firm upon those books?

A. We have. Ayres, Learned & Company undoubtedly collected some of Ayres, Learned & Wiswall's accounts. I do not know whether Ayres & Company collected any. In the ordinary course of business the succeeding firm collected the accounts of the preceding firm.

Q. Does your firm hold upon those books an account against Ebenezer Wiswall, in which you claim a balance due to the firm?

A. We do not.

Q. How was that settled?

A. It was settled from the assets of Frederick S. Ayres.

Q. Wasn't it settled and adjusted in pursuance of this contract of purchase?

A. Not to my knowledge.

Q. Didn't you understand it so as a member of the firm?

A. Yes, I understood it so.

Q. And that settlement and adjustment included the settling of this three thousand dollars by him?

A. Not that I know of.

Q. It stands charged upon the account and forms a part of this balance of thirteen thousand dollars?

A. Yes, sir.

Q. So that this item of three thousand dollars has actually
254 been settled by Ebenezer Wiswall, through your father, one of the defendants.

A. Yes, sir; it has been settled and adjusted by him.

Q. Can you state at what time the charge of this note was made on the books of Ayres, Learned & Wiswall, to Ebenezer Wiswall?

A. I think it was made in the following month, the latter part of the following month.

Q. The month after the note was given?

A. Yes, sir.

Q. That would be some time in April, 1870?

A. Yes, sir.

Q. When was there first any question raised about the correctness of that charge?

A. Since it was discovered.

Q. Was there any question raised about the correctness of the charge during the time that Ebenezer Wiswall was a member of the firm of Ayres, Leonard & Wiswall?

A. Not to my knowledge.

Q. How many years elapsed after that before any question was raised?

A. Over eight years, I guess.

Q. When was it first set up and claimed that the proceeds of this note was to apply as a payment upon the Catherine A. Wiswall mortgage?

A. I think it was the early part of the winter of 1878 or 1879.

Q. After this suit was commenced?

A. I am not sure about that; I do not recollect whether the suit was begun; it was when the first step was taken in the suit.

Q. Was it after William McAlpine Wiswall was at Port Austin, in the fall of 1878?

A. I think it was.

Q. And after he threatened foreclosure proceedings?

A. Yes, sir.

Q. You became interested in the firm at what time?

A. March 8, 1870.

Q. When did you first have an interest in the business of the firm?

A. 1871, I believe.

Q. Didn't you have an interest in the business of the firm as early as October, 1867.

A. I didn't.

Q. Had Frederick S. Ayres, one of the defendants to this
255 suit, at that time given you an interest in the property of the firm, in consideration of which you were to remain at Port Austin and look after the property and business of the firm?

A. I think not; or, in other words the execution of the contract between father and I was made March 8, 1870, and, as I recollect it now, at that time the firm of Ayres, Learned & Wiswall were doing business there, and the assets, both real and personal, were owned by them the fall of 1870. October 20, 1870, or about that time, the firm of Ayres, Learned & Company was formed, of which I was one of the partners, and when I began to take an active part in the business; my action prior to that time was in connection with my father and under his direction.

Q. Was there, from and after the month of October, 1867, an arrangement between you and your father by which you were to remain at Port Austin and look after the property and business of Ayres, Learned & Wiswall?

A. No such arrangement was consummated. There was an arrangement very much talked about, I guess, at that time, but it wasn't consummated until March 8, 1870.

Q. I am not now inquiring as to the date of the written agreement, but of the time that you first commenced to look after the business in pursuance of an understanding with your father.

A. I do not know when that was; the only recollection I have is from the papers; that is about the time you fix the time when I had an interest there by the execution of the contract; and I was there for some time before that, but whether I was there under any such arrangement as you suggest I do not understand it so.

Q. Are you not aware that your father, in the month of October, 1867, notified Ebenezer Wiswall, then at West Troy, that he had made such an arrangement with you, and that you were to remain there and look after the property and business of the firm?

A. I have no knowledge or recollection of anything of the kind.

Q. Will you look at the postscript of that letter and see in whose handwriting it is?

[Letter handed witness.]

A. Why, the whole letter is in my father's handwriting, the letter and postscript and all.

Q. Addressed to whom?

A. Addressed to E. Wiswall.

The letter identified by the witness, dated October 31, 1867, is offered in evidence as a part of the cross-examination of the
256 witness, and is hereto annexed, marked "Exhibit 2."

Q. Who had the management of the business of the firm of Ayres, Learned & Wiswall, at Port Austin?

A. Charles G. Learned.

Q. From the time you had this understanding with your father, didn't you remain at Port Austin and give particular attention to the conduct of the business there?

A. I gave my attention to the conduct of the business from the time I went to Port Austin.

Q. From 1867 down?

A. No; I think I went there in the summer or fall of 1866; yes, it was either the summer and fall of 1866 or the summer or fall of 1867, I am not sure which, but in conversation that I have had recently with some one that was there in that year I think I must have been there in 1866, the summer or fall of 1866; I have no written memoranda to fix the date.

Q. Was there about that time some dissatisfaction upon the part of your father as to the management of the business of the firm of Ayres, Learned & Wiswall?

A. The culmination—

Q. I do not speak of the culmination; I speak of the origin of the dissatisfaction.

A. I do not know how it originated—I can only speak of the facts. They had an investigation there, and the dissatisfaction there had a general origin about those matters; it was afterwards settled; that was in the winter of 1870, the latter part of the winter or the first part of the spring; the origin of which I know from heresay, but I know that in the latter part of the winter they had considerable difficulty there.

Q. Didn't that dissatisfaction exist for sometime previous to its culmination that you speak of in 1870?

A. Between whom?

Q. With your father and Mr. Wiswall, as to the management of the business by Charles G. Learned at Port Austin.

A. I understood there was some dissatisfaction before that, but I couldn't say how long before that; you put the date 1867; I am not able to say whether there was any dissatisfaction at that time; if there was I think it was not expressed; I do not think it came to my knowledge; I understood shortly before the winter of 1869 and 1870 there had been some expression of dissatisfaction, which culminated the latter part of the winter of 1870.

Q. Didn't you, in your father's behalf, and with an understanding there was dissatisfaction, for several years previous to this

culmination of 1870, pay particular attention to the business
257 transactions by Mr. Learned, and keep a memoranda of them for the purpose of reviewing the business at some future time?

A. I kept track of the business, or tried to, from the time I went there, and was able at the time of this difficulty to give them a statement of what I considered irregularities, which they considered as irregularities.

Q. Then you kept track of those irregularities with that particular thing in view?

A. I kept track of them because I thought it was my interest to do it; I didn't know that it would culminate at that time, but I supposed a day would come when it would be settled—when there would be a settlement of their matters there; father was away, and I guess for two or three years wasn't there; he was tied down to the business at Sandusky, and I was looking after his interest as well as my own, and kept track of this so that when the difficulty came up I was able to state the facts.

Q. Made yourself quite familiar with the business, did you?

A. Yes, I made myself familiar with the business from the time I went there; I devoted my time and attention to it.

Q. Were you not quite as familiar prior to your being a member of the firm as you were afterwards?

A. I wasn't.

Q. What difference was there?

A. There were matters between father and Wiswall, and between Learned, that I didn't know anything about that I learned about afterwards; but when I became a member of the firm then I knew everything, every transaction in relation to the business, because I was consulted, but before that time I was not consulted; I was asked for information but I was not consulted; they settled that between themselves.

Q. You were equally familiar with the transactions that appeared upon the books, were you not?

A. I was not.

Q. Didn't you have access to them from day to day?

A. Yes, sir.

Q. And from them you kept track of the irregularities you spoke of?

A. Not all of them; there were a great many that escaped my attention that I found upon examination that I didn't know any thing about before, particularly with the account of Charles G. Learned.

Q. Didn't you pay particular attention during that period from 1867 down to 1871, when you became a member of the
258 firm of Ayres, Learned & Wiswall, to the business and real estate transaction of the firm?

A. From the time that I commenced to give my attention to that part I paid particular attention; but, as I have stated before, that part of the business was done by Mr. Van Woert for some time; I

cannot say when I began to [give] particular attention to that part of the business.

Q. Have you any knowledge now that the proceeds of this note were intended to apply as a payment on the Catherine Wiswall mortgage?

A. I have not, only from hearsay, and that of course is no knowledge.

Q. Will you look at that letter, Mr. Ayres?

(Paper handed to witness.)

A. Yes; I have examined it.

Q. In whose handwriting is that?

A. It is my handwriting.

Letter testified to by the witness as in his handwriting, dated November 7, 1878, offered in evidence as a part of his cross-examination, annexed hereto, marked "Exhibit 3."

Q. At the time that letter was written, Mr. Ayres, did you have any knowledge of any claim that the proceeds of this note, "Exhibit 1," was claimed to be a payment on the Catherine A. Wiswall mortgage?

A. I hadn't.

Q. Will you look at that letter of September 8, 1875?

(Paper handed witness.)

A. That is my handwriting.

Q. How long had you been a member of the firm at the time this letter was written?

A. The firm of Ayres & Co.?

Q. The firm of Ayres & Co. and their predecessors.

A. My recollection is, that I became a member of the firm of Ayres, Learned & Co. in 1871—the fall of 1871. I have since that time been a member of the two firms of Ayres, Learned & Co. and Ayres & Co. to the present time.

Q. At the time this letter was written you had become quite familiar with the affairs?

A. It is dated when?

Q. September 8, 1875.

A. Yes, sir.

Q. Had informed yourself as to the status of the Catherine A. Wiswall mortgage by that time, hadn't you?

A. It seems not. I had knowledge of the payments I had
259 made myself for Ayres, Learned & Co. and Ayres & Co., but I hadn't posted myself in what Ayres, Learned & Wiswall had done in the matter.

Q. You conducted the correspondence in regard to that, didn't you?

A. From the time I became a member of the firm to the present time I conducted the correspondence of the two firms and made the payments for the two firms.

Q. And made the statements in regard to it?

A. I do not recollect making only one statement, which is in evidence here.

Q. This is as you understood the payments at that time?

A. Yes; I made those payments myself for the firm.

The paper identified by the witness is offered in evidence as a part of his cross-examination, and is hereto annexed, marked Exhibit "4."

Q. Have you at any time given any notice to the complainant or their solicitor that any part of the tender you claim to have been made was in the hands of Frederick St. Johns Lockwood?

A. I do not recollect; I haven't a copy of the notice with me; I suppose that notice was that certain amounts were in Allan Shelden's hands and certain amounts in Frederick St. Johns Lockwood's hands.

Q. What portion of the money yet remains in the hands of Allan Shelden in pursuance of the notice?

A. Sixteen thousand dollars; the balance—four thousand two hundred and eighty-eight dollars—is in the hands of Frederick St. Johns Lockwood.

Q. What time was the balance of the money withdrawn from Allan Shelden's hands?

A. No money was ever withdrawn from his hands that was ever put in there.

Q. I understood you to state that Allan Shelden & Company made the original tender.

A. You asked what money had been withdrawn from Allan Shelden's hands; none has been withdrawn from his hands.

Q. Then at the time of making the money tender by Allan Shelden & Company, was there any funds in the hands of Frederick St. Johns Lockwood?

A. Yes, sir; sent here for that purpose.

Q. And returned?

A. And returned.

Q. Can you now state at what time it was returned?

A. I think it was about six weeks after the tender was made.

260 Q. Have you given the complainants or their solicitor any notice of the withdrawal and return of that money, and that it would remain in the hands of Frederick St. Johns Lockwood?

A. I think not, unless it is in that original notice; I do not recollect but one notice I have given; I may have stated verbally to them about it, but I do not recollect now that I gave but one written notice.

Q. Didn't I understand you to state at one time that a portion of the money had been invested in United States four per cent. bonds?

A. Yes, sir.

Q. And is so invested now?

A. Yes, sir.

Redirect examination by Mr. ATKINSON:

Q. What portion is that?

A. Four thousand two hundred and eighty-eight dollars.
Q. That, you say, Mr. Lockwood has?
A. Yes, sir.
Q. He has informed you that he has invested that in bonds?
A. Yes, sir.
Q. Is it subject to the call of the complainants?

Objected to, as incompetent and immaterial.

A. Subject to their call at any time.
Q. When you say you do not claim that this was a payment of this three thousand dollar note upon the mortgage held by Catherine A. Wiswall, do you mean merely that you have no personal knowledge?
A. I have no personal knowledge that was claimed.
Q. You had claimed this ought to be allowed on the mortgage?
A. Yes, I had claimed it must be allowed on the mortgage?
Q. You say the account of Eben. Wiswall was adjusted by Frederick S. Ayres?
A. Yes, sir.
Q. How was it adjusted?
A. It was adjusted by having the moneys charged over to Frederick S. Ayres.
Q. At the time this was done, had it been discovered that this three thousand dollars had entered into this account?
A. It hadn't.
Q. Have you at any time since you discovered its payment claimed it was not to apply on the mortgage?
A. I have not.
261 Q. From whom did you learn that this payment had been made first?

Objected to, as incompetent and immaterial.

A. From Frederick S. Ayres.
Q. When was that?
A. That was last winter.
Q. At that time had you been able to find the note?
A. We hadn't.
Q. In pursuance of what he stated did you make a search?
A. Yes.
Q. And found this note?
A. I found the note; yes, sir.
Q. At the time that this three thousand dollars was paid Mr. Wiswall was there anything coming to him on the books?
A. No, sir.
Q. Was there a balance against him?
A. There was a balance against him of a little over five thousand dollars.
Q. There was no reason, then, why it should be paid to him as a partner?
A. No, sir.

Q. Your father originally owned one-half of the business of Ayres, Learned & Wiswall?

A. Yes, sir.

Q. Learned one-quarter and Wiswall one-quarter?

A. Yes, sir.

Recross examination by Mr. WINSOR:

Q. When you found this note did you also find upon examination that it was charged to Mr. Wiswall in his account?

A. I did.

Q. And was the account of Mr. Wiswall at that time charged over to your father?

A. It was not.

Q. Hadn't been?

A. No, sir.

Q. It was subsequent to the discovery of this note that it was charged over?

A. Yes, sir.

Q. And after your father claimed this note was given to apply on the mortgage as a payment, or the proceeds of it?

A. We claimed since we discovered it——

262 By Mr. ATKINSON:

The point is whether it was after you found this note and your father claimed it was a payment on the mortgage that it was charged over to him or before?

A. Oh, no; I stated, in answer to his first question, that it was first charged about a month af the it was given; it was charged to the individual account of Eben. Wiswall; and I also stated that afterwards that this account of Eben. Wiswall, in adjustment, the whole of his account and Charles Wiswall's account was charged to Frederick S. Ayres in adjustment.

By Mr. WINSOR:

Q. Was it before or after you found this note that the account of Ebenezer Wiswall was charged over to your father?

A. The account was charged before we found that note, because I stated this note wasn't found until last winter.

Q. Do you know anything about this note being a payment except what you have learned from your father?

A. Yes, sir; I have also heard from my brother, father and brother both; they stated this note was to be on account of the mortgage; as stated before, that wasn't my personal knowledge.

Q. You know nothing of your own personal knowledge?

A. I stated so; but I was so informed, and I know nothing further about it than I know from the letters and papers.

Q. When the balance of Mr. Wiswall's account was charged over to your father was you a member of the firm?

A. I was.

Q. Was that done during the existence of the firm of Ayres, Learned & Wiswall?

A. Yes, it was done just at the close and dissolution.
Q. When they were dissolving and settling up their affairs?
A. Yes, sir.
Q. Then you became interested in that property as a member of the firm after those charges were made?
A. Yes, sir.
Q. Also, Ebenezer R. Ayres?
A. He became interested in the property in 1874.

(It is stipulated and agreed by and between the parties, by their respective solicitors, that the signature of the witness to his deposition is waived.)

263 *Testimony of Ebenezer R. Ayres.*

EBENEZER R. AYRES, a witness produced on part of the defendants, being duly sworn, deposes and says:

By Mr. ATKINSON:

Q. Were you a member of the firm of Ayres and Learned?
A. I was.
Q. Have you looked at this note for three thousand dollars, dated March 1, 1870?
A. I have.
Q. Do you recognize the signature to it?
A. I do.
Q. By whom was that made?
A. Ayres and Learned, signed by Frederick S. Ayres.
Q. Will you state by whom that note was paid, if you know?
A. I paid the note.
Q. At the time the note was paid, what did you understand it to be paid upon?
A. The note was paid at the time the note was given; about ten days after the note was given, I was given to understand it was to apply on the Wiswall mortgage.

(The testimony of the witness as to what he was given to understand is objected to, as incompetent and immaterial.)

Q. You were given to understand it was to apply on the Wiswall mortgage. Can you tell from whom you got that information?
A. I think my father, F. S. Ayres.

Objected to, as incompetent.

Q, At the time you paid it, what did you understand it to be a payment upon?

Objected to as before.

A. The Wiswall mortgage.
Q. Did you ever hear any claim or pretense that it was to apply on Mr. Wiswall's general account instead of the mortgage?
A. I never did.
Q. You say you paid it yourself?

A. I think I sent the drafts on New York to the bank to pay this note myself. Either I did or my book-keeper did under my instruction.

Q. Were you at Sandusky at the time the mortgage was given by Catherine Wiswall,—the time it was signed by your father and mother?

264 A. I was in 1869, the 1869 mortgage.

Q. Do you know any computation of the amount due to Catherine Wiswall, was made at that time?

A. I never heard of any.

Q. You do not know of any?

A. No, sir.

Q. Would you be liable to know if any had been made?

A. Yes, I would have been certain to know it.

Q. Why?

A. Because I would have made it myself.

Q. You made such computations for your father, did you?

A. Always, any figuring of that kind I did for him.

Q. And you say no computation was made of the amount due?

A. I never knew of any.

Cross-examination by Mr. WINSOR:

Q. Do you recollect how long that mortgage remained in Sandusky at the time it was executed by your father?

A. My impression is it did not remain there at all. I never knew of it being there.

Q. It didn't remain in your hands?

A. No.

Q. You are quite positive of that?

A. I am positive of that.

Q. Did you buy any revenue stamps to put upon that mortgage?

A. I did, either I or my book-keeper.

Q. To whom did you give them?

A. My recollection is, that I sent them to Port Austin by mail.

Q. How long did the mortgage remain there?

A. Where?

Q. At Sandusky.

A. Well, I think just while Mr. Wiswall remained there; he was there, I think, two or three days at that time.

Q. Do you know who afterwards took that mortgage to Port Austin?

A. I do not; my recollection is, that Mr. Wiswall took it himself.

Q. Took it away?

A. Yes, sir.

Q. You are quite positive about that, are you?

265 A. I am quite positive that I didn't have the mortgage myself.

Q. Then if it remained there, or Mr. Wiswall left it there, it must have been left with your father, Frederick S. Ayres.

A. Yes, probably so.

Q. And if it remained there for a period of a month or more, it was undoubtedly in his custody during that time?

A. I should think so; I do not remember having it in my hands.

Q. If it did remain there for a long time, it must have been in his custody and not in yours?

A. I couldn't say, for I do not recollect anything about it.

Q. Do you not recollect it wasn't in yours?

A. I think I do.

Q. You are a member of the firm of Ayres and Company now.

A. Yes, sir.

Q. You purchased the interest of Mr. Learned in the Port Austin property covered by the Catherine A. Wiswall mortgage.

A. I did.

Q. You understood at the time of your purchase the amount of that mortgage?

A. No; I do not think I knew the amount.

Q. Didn't you specify it in your contract of purchase and buy subject to the payment of that mortgage?

A. I could not say as to that exactly what the contract was.

Q. You were there a number of days investigating the condition of the business of this firm, its property and liabilities, before you made that purchase?

A. Well, I was there, I think, about three days, but I investigated very little; I do not know that I made any investigation of the assets of the firm.

Q. Your contract of purchase was reduced to writing and executed by yourself and the two Messrs. Learneds?

A. Yes, sir.

Q. Have you, since your purchase, been engaged in trying to raise money to pay the Catherine A. Wiswall mortgage?

A. I have.

Q. Do you know William McAlpine Wiswall, one of the complainants in this case?

A. I do.

266 Q. Will you examine that letter and say if it is in your handwriting?

Paper handed witness.

A. It is.

Q. Addressed to William McAlpine Wiswall, one of the complainants in this cause?

A. Yes, sir.

The paper identified by the witness is offered in evidence as a part of his cross-examination, and is hereto annexed, marked "Exhibit 5."

Q. Do you know of your own knowledge that this note or the proceeds of it was designed to apply as a payment on the Catherine A. Wiswall mortgage?

A. No, I do not.

Q. When did you first hear of any claim of that kind—how long

before you purchased an interest in the property covered by the mortgage?

A. It was just after I bought, I think about one year ago, my attention was first called to this note.

Q. Since this suit was commenced?

A. When was this suit commenced?

Q. Some time last fall.

A. Yes, I think it must have been after this suit was commenced.

Q. Did anybody call your attention to it except Frederick S. Ayres?

A. My attention was called to it by a letter of James S. Ayres.

Q. When did you first hear any claim set up that there was an error in the sum of the mortgage as given in the Catherine A. Wiswall mortgage?

A. Some time last year, I couldn't say exactly when.

Q. About the time that this suit was commenced?

A. Before the suit was commenced.

Q. How long before?

A. I couldn't say; it was some time last fall; it may possibly have been after the suit was commenced.

Q. It was at least some four years after you became a member of the firm of Ayres and Company, and interested in the property covered by the mortgage?

A. Yes, at least four years.

267 Redirect examination by Mr. ATKINSON:

Q. You say your attention was first called to this note at that time; you mean, I suppose, since the time it was given; you knew at the time the note was given, and what it was given for?

A. Yes, I knew at the time the note was given, and exactly what it was for.

Q. Did you ever hear the note talked of at all afterwards until it was claimed to be a payment on the mortgage?

A. I didn't.

Q. So the first time it was spoken of at all it was claimed to be a payment on the mortgage?

A. Yes, sir.

Q. You had no charge of the conduct of the firm, and were not living at Port Austin?

A. No charge of the conduct of Ayres, Learned & Wiswall.

Q. And never were there to see what payments had been made?

A. Never.

Q. They were made entirely by other members of the firm?

A. Yes, sir.

Q. Were you quite familiar with the notes given at the time this note was given?

A. Yes, sir.

Q. And what they were given for?

A. I knew everything that went on the books at that time.

Q. And did the financial business of the firm?

A. I did; I took charge of everything of that kind myself.

Q. At the time you bought from Learned did you know that this three thousand dollar payment had been made upon the mortgage?

A. I didn't know anything about it.

Q. You knew that the three thousand dollar payment had been made, didn't you?

A. I knew at the time it was made, but I didn't recollect anything about that.

Q. You mean it wasn't present to your recollection at that time?

A. No.

Q. But it was after you had paid this three thousand dollars that you bought of Learned?

A. Yes, sir.

268 Q. And bought the quarter interest?

A. Yes, sir.

Q. When you wrote this letter, had you computed the amount due upon the mortgage?

A. I had never computed it; never had anything to do with the mortgage.

Q. It was only a jumping or rough guess as to what was due upon it?

A. That was all; I had no personal knowledge [of] anything about it.

Q. When you speak of an amount due from your father to Mr. Wiswall, that is an entirely separate matter, isn't it?

A. Yes, sir.

Q. And had nothing to do with this mortgage?

A. Nothing.

Re-cross examination by Mr. WINSOR:

Q. You say at the time this note was given you had the management of the financial affairs of the firm; do I understand you to mean the firm of Ayres, Learned & Wiswall?

A. Ayres & Learned, at Sandusky.

Q. You were not then a member of the firm of Ayres, Learned & Wiswall?

A. I was not.

Q. And had no connection with the property or assets of the firm until you became a member of the firm of Ayres & Company?

A. No.

Q. This note was made during the existence of Ayres, Learned & Wiswall, wasn't it?

A. Yes, sir.

Q. And you had no interest in whom it was charged to, directly or indirectly, at that time?

A. Yes, I had an interest in having it charged to Ayres, Learned & Wiswall.

Q. But among the members of the firm to whom it was charged?

A. Yes; I had to know to whom the money was going.

Q. You charged it upon the books of your firm of Ayres, Learned & Wiswall, didn't you?

A. Yes; Ayres, Learned & Wiswall paid to Ebenezer Wiswall.

269 Q. And rendered an account to Ebenezer Wiswall?

A. Yes, sir.

Q. And rendered an account so stating it to Ayres, Learned & Wiswall?

A. Yes, sir.

[It is stipulated and agreed that the signature of the witness to his deposition is waived.]

270 *Notice to Take Testimony.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL *et al.*, Complainants.

vs.

FREDERICK S. AYRES *et al.*, Defendants.

SIR: Please to take notice that the following witnesses, to wit: George G. Learned, of Pittsfield, Mass.; William McAlpine Wiswall, of New York City; Ebenezer Wiswall and G. B. Wilson, of West Troy, N. Y.; George B. Noble, Charles B. Hull, Walter Ingersoll, and Dewit C. Holbrook, of Detroit, Mich., will be examined as witnesses and their testimony taken on behalf of the complainants in the above entitled cause, before James A. Randall, one of the circuit court commissioners for the county of Wayne, in the State of Michigan, such examination to commence on the 20th day of October, A. D. 1879, at one o'clock in the afternoon, and to proceed as shall suit the convenience of said commissioner.

Dated at Port Austin, Mich., October 13th, A. D. 1879.

Yours, &c., RICHARD WINSOR,
Solicitor for Complainants.

To James H. Hall, Esq., solicitor for the def'ts, Frederick S. Ayres and James S. Ayres.

And to Horace G. Snover, Esq., solicitor for the def'ts, Ebenezer Wiswall and Charles G. Learned.

A notice, of which the foregoing is a copy, was served upon me this thirteenth day of October, 1879.

JAMES H. HALL,
Solicitor for Def'ts, Frederick S. Ayres and James S. Ayres.

A notice, of which the foregoing is a copy, was served upon me this thirteenth day of October, 1879.

HORACE G. SNOVER,
Solicitor for the Def'ts, Charles G. Learned and Ebenezer Wiswall.

271 *Defendants' Exhibit* 1—*Randall.*

$3,000. SANDUSKY, OHIO, *March 8th*, 1870.

Three months after date we promise to pay to the order of Ayres,

Learned & Wiswall three thousand dollars, at the National Bank of West Troy, N. Y.

Value received. AYRES & LEARNED.

Stamped on the face as follows: (National Bank, West Troy: Paid.)

Endorsed on the back as follows: Stamps. Ayres, Learned & Wiswall, Port Austin, Michigan. Avails of this note credit E. Wiswall in ac't, March 15, 1870, for the purpose of making his ac't good for $3,000, note of his maturing March 17, 1870; done by direction of Ayres, Learned & Wiswall; see their letter of March 8, 1870.

PORT AUSTIN, *March 8th*, 1870.

CASHIER NAT'L BANK OF WEST TROY:

DEAR SIR: We enclose you herewith Ayres & Learned note for $3,000, to pay a note of Mr. E. Wiswall's—note falling due soon. Mr. Wiswall is here and not well, and at his request we send note to pay the note falling due soon.

Yours, truly, AYRES, LEARNED & WISWALL.

Memoranda on above letter: Ayres & Learned note at 3 m's from date, March 8, 1870, pay't to now Ayres, Learned & Wiswall, at Nat. Bank of West Troy; am't $3,000. Dis'd March 15; avails cr'd E. Wiswall in ac't.

272 THE FIRST NATIONAL BANK OF WEST TROY,
WEST TROY, N. Y., *March* 15, 1874.

MESSRS. AYRES, LEARNED & WISWALL.

SIRS: Your favor of 8th inst. is received with one enclosure, Ayres & Learned's note, due June 11th; am't, $3,000.

Respectfully yours, G. B. WILSON, *Cashier.*

As requested, we have discounted same and placed avails, $2,934.83, to credit of Ebenezer Wiswall, in ac't, and will charge his ac't with his note maturing 17th inst.; am't, $3,000.

273 *Complainants' Exhibit* 2.

SANDUSKY, *Oct.* 31, 1867.

E. WISWALL, Esq.

DEAR SIR: Yours of the 17th ult. came during my absence. I have been to Piqua, Richmond, Indianapolis, and Louisville. Think I have opened up a good trade there; sold there about four thousand dollars' worth. Our sales are about eighty thousand dollars below the sales of last year up to this time. We have a large stock on hand. It is good property, but will not pay notes or buy supplies. We have in good account and notes about thirty five thousand dollars, and we have to sell on time, 60 and 90 days. I shall go to Cincinnati this evening, and shall make a strong effort to sell. I shall buy 100 barrels of pork while there. I have bought all the corn and oats we want. I expect to have all the money I shall want

to pay for supplies, but I think we shall want to get a note discounted for 5,000 dollars to pay the note coming due the 29th of November. I shall know more about it on my return from Cincinnati. Freight has advanced some on the lakes, and I am in hopes that there will be more call for lumber. We are selling as much or more than our neighbors, and when it does start I have no doubt but that we shall get our proportion of the trade. We are selling lumber at present as follows: Clear 55, sec. clear 50, box (thick) 45, box (inch) 43, finishing 39 dolls., barn boards 22, common 16 and 17 dolls. You will see there has been no falling off, except on the common lumber.

I bought all the land Donahue owned in 18—13, except a few descriptions in the southeast corner of the towns, by written contract, naming the descriptions, for three thousand dollars, and he agrees in the contract to allow the award of 2,400 dollars in our favor on the contract, the balance of the purchase money to be paid after the delivery of the deeds. This contract we have put on record in Port Austin. Donahue has since sold and deeded the same lands to Howe & Clark, the parties to whom he sold his mill property. Howe & Clark are making preparations to lumber on this land; I have written to James to forbid them entering on them lands, or cutting any of the timber, as the property belongs to A., L. & W. I think there can be no doubt but what we can hold the land. (What is your opinion?) I intend to go to Port Austin as
274 soon as I can get our supplies on the way there. We have about 130 M dolls. worth of lumber, lath, and shingles on hand. The Ocean has gone to Port Austin, and will make two or three more trips.

I shall return from Cincinnati by the middle of next week, and shall hope to hear from you about that time. I think you had better have new policies made out on the mill for the same amount as the old ones, and have the new policies refer to the recent survey of the property by Verdor, of Detroit, with the privilege endorsed on the policies of further insurance of 25 thousand dolls. Have the policies worded the same as the old ones. We have 14 thousand doll. insurance in Detroit at 6 per cent. Send policies here, and we will send the money by the first of the month.

Yours truly, F. S. AYRES.

I have given James one-fifth of my interest in the Pt. Austin property. He is to stay there and look after the property and business.

F. S. AYRES.

275 *Complainants' Exhibit 3.*

PORT AUSTIN, *Nov. 7th*, 1878.

E. WISWALL, Esq.

DEAR SIR: Father arrived home last Sunday, all right. Enclosed I send you quit-claim deed for 40 acres of land on the Pinnebog river. This is one of the pieces of land that H. K. Fitchet bought for Odell. Price paid for it is to be $250; of which the

party paid $62, which amount I herewith enclose check for. Upon delivering of your quit-claim for the land, Odell will pay balance of purchase price. Fitchet was here to-day, and promised to pay for his 80 acres in about ten days; amount, $450. As soon as this amount, together with Odell's balance, is paid, I will send to you to apply on father's notes. Father says that he thinks he will be able to borrow ten to twenty thousand dollars to apply on mortgage, and that he will write Will in a few days. Send the amount of your expenses in making two (2) quit-claim deeds, and I will remit for them at time I send money to you for Fitchet's and Odell's land. Send acknowledgment of the check enclosed and formal quit-claim deed at your earliest convenience, and oblige,

Yours sincerely, J. S. AYRES.

276 *Complainants' Exhibit* 4.

PORT AUSTIN, *Mich., Sept.* 8, 1875.

WM. MCA. WISWALL, Esq.

DEAR SIR: Yours in reply to our letter to your father duly received. We regret that circumstances have prevented us from doing anything for you in the past eighteen months. The unprecedented depression in the lumber and salt business has made money matters so close with us that we have been unable to create a surplus in our business; it is our intention, however, to make a payment out of our lumber when we get all the logs that we have on hand cut up. Owing to the low price of salt we have been compelled to abandon our kettle salt blocks, and have put up a pan salt block (at an expense of $1,000). We can now manufacture salt much cheaper than by the old process. We have undertaken to pay your father $4,200 this fall on ac't of F. S. Ayres' contract. When this payment is made it will be about $46,000 that we have paid your father since he retired from the business here, nearly four years since. Eighteen thousand ($18,000) dollars of this amount was paid on ac't of your mortgage and balance on ac't of father's contract for the purchase of your father's quarter interest of the Port Austin property. With two or three successful business years we think we shall be able to cancel your mortgage. You may rest assured, however, that we will do our level best, for we are very desirous to pay it as soon as possible.

Yours, respectfully, AYRES & CO.

277 *Complainants' Exhibit* 5.

SANDUSKY, OHIO, *Nov. 22nd*, 1878.

WM. MCA. WISWALL, Esq., *New York City.*

DEAR SIR: James has been here and left again for Port Austin to prepare statement for some Detroit parties who are talking of letting us some money. We are in strong hopes of getting this money, as they are business men with whom we have dealt a great many years. They proposed, in the first place, to let us have $20,000, but James and I concluded we would need $25,000, as it

would be necessary to first pay your father up in full, so as to give us clear title. We ask for latter amount, and as soon as statement is received by them from James, they are to give us an answer. Your father's bal., I believe, is between $7,000 and $8,000, which would have to be paid first, then we propose to pay your interest in the mortgage and divide balance among other four. We cannot effect this loan without canceling the present mortgage, and giving a new one on time, say five years, which, if the arrangement is carried out, would am't to about $20,000. In the new mortgage we would expect to give your family the best security there is to give, amounting to over $100,000. The salt works, docks, &c., all the village property, and all the lands (about 1,400 acres) in town of Port Austin, including farm. We were going to look for some money elsewhere, but as these parties told us to look no further, we think they will let us have it, or at least $20,000. If this arrangement is carried out it would be necessary for me to meet you all in West Troy that I might know exactly what we could do. If the parties give favorable answer, can you and Charley meet me in West Troy where the others are? I hope to hear from James again within ten days; we have a good many papers to make out and it will take some time.

Truly yours,

E. R. AYRES.

278 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL *et al.*, Complainants,

vs.

FREDERICK S. AYRES *et al.*, Defendants.

In pursance of the stipulations heretofore made and filed in the above entitled cause, and of the notices, copies of which are hereto annexed, with proof of service thereon endorsed, I, the subscriber, the circuit court commissioner for the county of Huron, in the State of Michigan, do hereby certify and report, that on the 28th day of November, 1879, at one o'clock in the afternoon of that day, at the Winsor House, in Port Austin, Michigan, Richard Winsor appearing as solicitor for the complainants, no person appearing for the defendants, I proceeded to take the testimony of the following witnesses, to wit: Charles G. Learned and Richard Smith, together with the other proofs hereto annexed as exhibits, as more fully appears by the record thereof hereto annexed and made a part of this my report; that said proofs were offered, taken, and closed on said 28th day of November, 1879.

GEORGE C. GREEN,
Circuit Court Commissioner, Huron County, Mich.

279 *Testimony of Charles G. Learned.*

PORT AUSTIN, MICH., *Nov.* 28, 1879—One o'clock p. m.

Before me, George C. Green, circuit court commissioner in and

for the county of Huron, at the Winsor House, in the village of Port Austin, in said county, Charles G. Learned was produced, sworn and examined, as a witness upon the part of the complainants in the foregoing entitled cause.

Q. Mr. Learned, state your age and place of residence.

A. Am sixty-two last December, 13th day. My residence is Port Austin, Huron county, Michigan.

Q. Were you a member of the firm of Ayres, Learned & Wiswall, of that place, during the whole existence of the firm?

A. I was.

Q. Who managed the business of the firm during that time here or at Port Austin?

A. I had the management of it here at this end.

Q. Did you know of the existence of the Calvin P. Austin mortgage on the real estate of the firm, at the time you purchased the property?

A. I did.

Q. Do you know who became the owners of that mortgage in the fall of 1860?

A. Catherine A. Wiswall, wife of Ebenezer Wiswall, one of the firm.

Q. What interest did you understand the firm were paying on that mortgage?

A. They were paying ten per cent. at that time.

Q. Do you know how that mortgage was paid?

A. We gave another mortgage, a new mortgage, bearing interest at seven per cent.

Q. Who executed that mortgage?

A. Each one of the firm signed it with their wives; that is, Frederick S. Ayres and wife, Ebenezer Wiswall, and myself and wife.

Q. Do you remember when the firm of Ayres, Learned & Wiswall dissolved?

A. Eight years last October.

Q. What payments were made on that mortgage prior to the dissolution of the firm?

A. I don't know of any.

280 Q. What claims prior to the eight and ten thousand dollar payments did you ever hear of before this suit was commenced?

A. I never heard of any. After we gave the new mortgage we were to pay the interest promptly, and Mr. Wiswall complained because he was not paid.

Q. Did you ever hear any claim of any error entering into the sum of the mortgage given Catherine A. Wiswall by Frederick S. Ayres, down to the time of the commencement of this suit?

A. Not any.

Q. Do you remember who brought you the Catherine A. Wiswall mortgage to sign?

A. I think it was James S. Ayres.

Q. Have you since sold your interest in the property covered by that mortgage?

A. I have; five years ago last October, in the fall of 1874.

Q. To whom did you sell?

A. I sold to Ebenezer R. Ayres, of Sandusky, Ohio, one of the defendants in this case.

Q. What provision was made for the payment of this mortgage; was it to become a part of the consideration of the sale?

A. It was.

Q. What claim was there made, if any, as to a mistake in the amount of the mortgage?

A. Not any.

Q. Do you know James S. Ayres?

A. I do.

Q. Will you state what he had to do with the conveyancing of the firm after he came to Port Austin?

A. He being the only legal member of the firm, he drew all the deeds, and contracts, and mortgages. I am satisfied he drew the Catherine A. Wiswall mortgage, as there were some pieces of land left out which Mr. Wiswall afterwards complained about, a piece called the fly, and a piece up where my house is.

Q. State how James S. Ayres was interested with the firm.

A. He held his father's contract for a part of his interest, two-twentieths, I think; he was not known directly as a member of the firm.

Q. When you sold your interest in the firm, what sum did the payment of the mortgage represent in consideration of the sale?

A. Between forty and forty-one thousand, one-quarter of which my interest in the property was liable for; or in other words, I owned one-quarter interest in the property covered by the mortgage.

281 Paper here shown witness marked "Exhibit A 1," hereto annexed.

Q. In what handwriting is "Exhibit A 1"?

A. Frederick S. Ayres, one of the defendants.

Counsel for complainants here offer in evidence "Exhibit A 1."

Another paper here shown witness marked "Exhibit A 2," and asked in whose handwriting it is?

A. Frederick S. Ayres'.

"Exhibit A 2" also offered in evidence by complainants' counsel.

CHAS. G. LEARNED.

Subscribed and sworn to before me, this 28th day of November, A. D. 1879.

GEORGE C. GREEN,
Circuit Court Commissioner, Huron County, Michigan.

Counsel for complainants here offered in evidence certified transcript of record of a mortgage from Rollin C. Smith, Alfred A. Dwight, William A. Howard, to Calvin P. Austin, hereto annexed and marked "Exhibit A 3."

Counsel for the complainants offer in evidence certified copy of the enrollment of the case of Calvin P. Austin, complainant, against William A. Howard, Ellen J. Howard, William Warner, Rollin C. Smith, William Carpenter, Mary A. Smith, Alfred A. Dwight, Laura A. Dwight, The Detroit Locomotive Works, Thomas B. Ross, and Simeon Smith, defendants, in the circuit court for the county of Sanilac, in chancery, being the record of the foreclosure of the mortgage, a certified copy of which was last offered in evidence, which record is hereto annexed and marked "Exhibit A 4."

Testimony of Richard Smith.

RICHARD SMITH, also produced, sworn, and examined on the part of the complainants.

Q. Mr. Smith, state your age, and place of residence?

A. Thirty-nine; residence, Port Austin, Mich.

282 Q. Were you a register of deeds in the year 1869 for Huron county, Michigan?

A. Yes.

Q. Do you recollect a mortgage given by Frederick S. Ayres, Ebenezer Wiswall, and Charles G. Learned, to Catharine A. Wiswall, for the sum of forty thousand odd dollars?

A. I do.

Q. Do you know who recorded that mortgage?

A. I believe I recorded that myself.

Q. Can you state who brought it to the office for record?

A. I am not positive now who brought it.

Q. What do you remember about taking it at James S. Ayres' request to Ayres, Learned & Wiswall's office, and comparing it with a commissioner's deed, and calling his attention to some omissions of some of the descriptions from the mortgage?

A. I think I did so, but don't distinctly remember the particulars.

Q. Was the record of the mortgage a correct copy of the original?

A. I should say it was.

Q. Can you state to whom the mortgage was delivered after record, and who paid for the recording?

A. I do not recollect, but know that James S. Ayres done most of their business at that time with me; it was my custom to note in the entry books to whom mortgages were delivered when recorded.

RICHARD SMITH.

Sworn to and subscribed before me, this 28th day of November, A. D. 1879.

GEORGE C. GREEN,

Circuit Court Commissioner, Huron County, Michigan.

283 EXHIBIT A 1.—(G. C. G., C. C. M.)

SANDUSKY, *Dec.* 9, 1865.

E. WISWALL, ESQ.:

DEAR SIR: Yours of the 5th instant came to hand last evening; yours of the 23d ult. also came duly to hand. I delayed answering yours of the 23dd ult. for the reason that I was not prepared to make a statement of our affairs; since then we have sold all the lumber we shall this season. I will make you a statement based upon our property here in Sandusky only; there is due us on our books here in Sandusky, (which will all be paid in 30 days,) as per enclosed statement $14,400 72
Lumber in the yard, estimated 36,000 00

$50,400 72

Debts in Detroit	$11,000 00	
Debts in West Troy, one note	10,266 67	
" " three notes	7,826 14	
Other debts in West Troy, estimated	3,000 00	
		32,092 81
Balance		$18,307 91

We have sent a very large stock of stuff to Port Austin, expecting to get out a large stock of logs, shingle bolts, fence posts, etc.

The last boat for Port Austin left Detroit Tuesday morning. Eb. went to Detroit to see if all of our goods went up; I think they have all gone up. There was in Detroit 20 boxes of axes, and a number of large boxes, which went up; I think the goods have all gone. I also sent up by the boat 2,000 doll. The Ward is only going to Port Austin for a load of salt. Nearly a million of feet of our best logs at Port Austin could not be sawed up in time to ship this fall, in consequence of the boilers giving out. I bought flour in place of wheat, so that we could shut down the mill early to give plenty of time to repair the boiler.

I am going to Cincinnati next week; shall be gone a week
284 or more; after my return I shall go to W. Troy. I intend to go to Port Austin soon after the first of January, to remain there until spring. The Ocean, after paying all of his running expenses and about 900 dollars outfit, has cleared about 5,800 dollars, perhaps 6,000 dollars; I cannot tell the exact amount, for have not received from Port Austin shipping bills for two last loads. You can rely upon our sending you drafts to pay the three notes, amounting to $7,826.14, due next month, in time to meet them. We will send you as much more as we can. We shall send you some money as early in this month as we can, I think next week. If you can do so, I hope you will put off the payment of the $10,266.67 note, and pay all of the other bills first. We can undoubtedly pay that note this winter. We shall have to send more money to Port Austin about the first of January to pay taxes, &c. We are working off the lumber as fast as we can. I think I can see out of the woods

for the first time this summer. I expect to start next spring out of debt, except what I owe Whitley, Mrs. Wiswall, and my wife. With a reasonably good winter we shall have a large amount of property next spring to pay with. After the land is all sold we will make a statement of the average prices the land has sold for. I am satisfied that the only way to run a saw mill is to have a lumbey yard in connection.

I hope you will be able to go to Port Austin with me in January. I suppose Mrs. Ayres will go with me. I do not know that we owe as much in Detroit as represented. I have allowed 1,400 dollars for steamboat debts; I have no idea that we can owe as much. I also think that the lumber on the yard will overrun two or three thousand dollars. Eb. made the estimate of lumber in the yard, and says he intended to under-estimate it. Unless we buy a good many shingles this winter, I think we shall have all the money we can probably want in Port Austin. I gave Laidlow a contract to get in logs this winter; he intends to get in two million feet. Laidlow's old contract is all settled up and paid up. I sent the Ocean to Detroit. I shall take off of her her mast and rigging and sell them. I am going to have her * * *

F. S. AYRES.

285 EXHIBIT A 2.

PORT AUSTIN, *Nov.* 18, 1863.

E. WISWALL, Esq.:

DEAR SIR: * * * The prospects are, as I understand them, that we shall not want to pay the Austin Mortgage under a year, and perhaps not then. We have expended a large amount for timber, pine lands, and supplies, much larger for supplies than we ever did before, partly in consequence of the extreme high prices.

* * * * * * *

Yours, truly, F. S. AYRES.

286 EXHIBIT A 3.

Rollin C. Smith, Alfred A. Dwight, and Wm. A. Howard, to Calvin P. Austin.

Received for record November 16th, 1853, at 5 o'clock p. m.
RANDAL WIXSON, *Deputy Register.*

This indenture, made the tenth day of November, A. D. eighteen hundred and fifty-three, between Rollin C. Smith, Alfred A. Dwight, and William A. Howard, of Detroit city, Wayne county, and State of Michigan, of the first part, and Calvin P. Austin, of Orwell, Rutland county, and State of Vermont, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of thirty-one thousand nine hundred dollars, lawful money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged and confessed, have granted, bargained, sold, released, enfeoffed, and confirmed, and by these presents do grant, bargain, sell,

release, enfeoff, and confirm, unto the said party of the second part and to his heirs and assigns forever all those certain pieces or parcels of land situated in the county of Huron and State of Michigan, and described as follows, to wit:

The south part of southeast fr'l ¼ of section twenty-two (22), eighty acres; the southwest ¼ and southwest ¼ of northeast ¼, and southeast ¼ of northwest ¼, of section twenty-six (26), two hundred and forty acres; the southeast quarter, and northwest quarter, and northwest quarter of southwest quarter, and west half of northeast quarter, and east half of southwest quarter, of section twenty-seven (27), five hundred and twenty acres; the west half of southeast quarter and south half of northwest quarter, and west half of southwest quarter, and southeast quarter of southwest quarter, of section twenty-eight (28), two hundred and eighty acres; and south west quarter of southwest quarter, and northwest
287 quarter of northeast quarter, and southeast quarter, and southeast quarter of northeast quarter, and east half of northwest fr'l quarter, of section twenty-nine (29,) three hundred and eighty-two acres and $^{90}/_{100}$; the north half of southwest quarter and northeast quarter of southeast quarter of section thirty (30), one hundred and twenty acres; the southeast quarter and east half of northeast quarter of section thirty-one (31), two hundred and forty acres; the northeast quarter and west half of southeast quarter, and east half of southwest quarter, and east half of northwest quarter, and southeast quarter of southeast quarter, of section thirty-two (32), containing four hundred and forty acres; the east half of northwest quarter, and west half of northeast quarter, and south half of southeast quarter, and south half of southwest quarter, and northeast quarter of southeast quarter, and northeast quarter of northeast quarter, and northwest quarter of southeast quarter, and northwest quarter of northwest quarter of section thirty-three (33), four hundred and eighty acres; the south half of southwest quarter, and east half of northwest quarter, and northeast quarter of southeast quarter of section thirty-four (34), containing two hundred acres; the southeast quarter of southeast quarter of section thirty-six (36), containing forty acres; all the forementioned lands being in township No. nineteen (19) north, of range No. thirteen (13) east.

Also, the east part of northeast fractional quarter, eighty and 38-100 acres, and northeast quarter of southeaet quarter, forty acres of section No. one (1); the northeast fractional part of northwest fractional part, forty-five and 60-100 acres; the west fractional part of northwest fractional quarter, eighty-five and 35-100 acres; north part of northeast fractional quarter, ninety-one and 95-100 acres; the southeast quarter of southwest quarter and west half of southwest quarter, and southwest quarter of southeast quarter of section three (3), three hundred and eighty-two and 90-100 acres; the northeast fractional quarter of nortneast fractional quarter, forty-four and 75-100 acres; and south half of northeast fractional quarter, eighty acres; and northwest fractional quarter, one hundred and sixty-eight and 73-100 acres; and south half of south-

west quarter, eighty acres; and northwest part of northeast fractional quarter, forty-four and 62-100 acres, of section four (4); the east fractional part of northeast fractional quarter, eighty-four and 29-100 acres; and east half of southeast quarter, eighty acres; and northwest part of northwest fractional quarter, forty acres; and northwest part of northeast fractional quarter, forty acres, of section five (5); the southwest part of southwest fractional quarter, forty acres; and east part of northwest fractional quarter, and
288 east half of southwest quarter, one hundred and sixty acres; and west half of southeast quarter, eighty acres, of section six (6), the northwest fractional quarter, one hundred and sixty-four and 17-100 acres; and southwest fractional quarter, one hundred and sixty-four and 13-100 acres; and west half of northeast quarter, eighty acres; and west half of southeast quarter, eighty acres, of section seven (7), the east half of northeast quarter, eighty acres, of section eight, (8), the southwest quarter of southeast quarter, and east half of southeast quarter, and southwest quarter, and northwest quarter of southeast quarter, and northeast quarter of section nine (9), four hundred and eighty acres; the northwest quarter of southwest quarter, and east half of northwest quarter, and south half of southwest quarter, of section ten (10), two hundred and eighty acres; the west half of southwest quarter of section No. thirteen (13), eighty acres; the east half of southeast quarter of section fourteen (14), eighty acres; the northwest quarter and southwest quarter of southwest quarter, and northeast quarter of southeast quarter of section No. fifteen (15), two hundred and forty acres; the west half of northeast quarter and northwest quarter of northeast quarter, and north part of southwest fractional quarter and northwest fractional quarter of section No. eighteen (18), three hundred sixty eight and 16-100 acres; the northwest quarter of northwest quarter of section twenty-three (23), forty acres; the northwest quarter of the northwest quarter of section twenty-eight (28), forty acres; the northeast quarter of northeast quarter of section twenty-nine (29), forty acres; and east half of southeast quarter of section thirty-six (36), eighty acres; the northeast fractional quarter of section six, one hundred and sixty-seven and 40-100 acres; the southeast quarter of section No. four (4), one hundred and sixty acres; the northwest quarter of section No. nine (9), one hundred and sixty acres; the southeast quarter of southeast quarter of section No. seventeen (17), forty acres; the northeast quarter of northeast quarter of section No. twenty (20), forty acres; and southeast quarter of southeast quarter of section twenty (20), forty acres; all in township No. 18 north, of range thirteen east. Also the west fractional part of northwest quarter of section six (6), seventy-six and 66-100 acres; the west part of southwest fractional quarter, and southwest quarter of northeast quarter, and north half of northeast quarter, and east half of southwest fractioual quarter, and southeast quarter of northwest fractional quarter of section No. nineteen (19), three hundred and nine and 44-100 acres; the northeast
289 quarter of northwest fractional quarter of section thirty (30), containing forty acres; all in township No. eighteen north, of

range fourteen east. Also the east part of northeast fractional quarter of section No. one (1), and northeast quarter of northeast quarter of section twelve (12), all in township No. seventeen north, of range No. 13 east, containing one hundred and twenty and 83-100 acres. Also the west part of southwest fractional quarter of section six (6), eighty two and 16-100 acres; the north part of northwest fractional quarter of section seven (7), eighty-one and 78-100 acres; the north half of northeast quarter and north half of northwest quarter of section seventeen (17), one hundred and sixty acres; all in township No. 17 north, of range fourteen east. Also the southwest quarter of southwest quarter of section thirty-one (31), in township No. 19 north, of range No. fourteen east, forty acres. Also west half of southeast quarter of section twenty-five fractional, and lots No. two and No. three in fractional section twenty-five (25), and northwest quarter of northwest quarter of section thirty-six (36), all in township number nineteen (19) north, of range twelve (12) east, and containing two hundred and seventy-four and 26-100 acres. Also the east half of southwest quarter and southwest quarter of southeast quarter of section one (1), one hundred and twenty acres; and east half of southeast quarter and northwest quarter of northeast quarter of section No. twelve (12), one hundred and twenty acres; the northeast quarter of the northeast quarter of section thirteen No. (13), forty acres; and south half of southeast quarter of section twenty-five (25), eighty acres; and north half of northeast quarter of section thirty-six (36), eighty acres, all in township number eighteen north, of range number twelve east.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and every part and parcel thereof, with the appurtenances. To have and to hold the above bargained premises with the appurtenances to the said party of the second part, his heirs and assigns, to the sole and only proper use, benefit and behoof of the said party of the second part, his heirs and assigns, forever: Provided, always, and these presents are upon this express condition that if the said party of the first part, or their heirs, executors, or administrators, shall and do well and truly pay, or cause to be paid, to the said party of the second
290 part, his heirs or assigns, the just and full sum of thirty-one thousand nine hundred dollars, on the tenth day of July next, with ten per cent. interest after that date, according to the conditions of a certain bond bearing even date herewith, executed by the party of the first part to the said party of the second part, as a collateral security, then these presents and said bond shall cease and be null and void. But in case of non-payment of the said sum of thirty-one thousand nine hundred dollars, or interest thereof, or any part thereof, at the above time limited for the payment thereof, then and in such case it shall be lawful for the said party of the second

part, his heirs and assigns, and the said party of the first part doth hereby empower and authorize the said party of the second part, his heirs and asssigns, to grant, bargain, sell, release, and convey the said premises, with the appurtenances, at public auction or vendue, and on such sale to make and execute to the purchaser or purchasers, his or their heirs or assigns, forever, good and ample and sufficient deed or deeds of conveyance in the law, pursuant to the statute in such case made and provided, rendering the surplus moneys (if any there should be) to the said party of the first part, his heirs, executors, or administrators, after deducting the principal and interest moneys due as aforesaid. And it is hereby expressly covenanted by the said party of the first part, that this mortgage shall not be subject to any provision of any statute law now being or hereafter to be in force, regulating the appraisal or set-off of the said mortgaged premises.

In witness whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

ROLLIN C. SMITH. [SEAL.]
ALFEED A. DWIGHT. [SEAL.]
WILLIAM A. HOWARD. [SEAL.]

Signed, sealed, and delivered in the presence of—
C. N. GARRISON.
WILLIAM A. COOK.

STATE OF MICHIGAN, } ss:
Wayne County, }

On this 12th day of November, A. D. eighteen hundred
291 and fifty-three, personally appeared before me, a notary public in and for Wayne county, Rollin C. Smith, Alfred A. Dwight, and William A. Howard, to me known to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed.

WILLIAM A. COOK,
Notary Public, Wayne County, Michigan.

SANILAC COUNTY, REGISTER'S OFFICE.

Received for record November 16th, 1853, at 5 o'clock, p. m., and recorded in liber 1 of mortgages, pages 267 and 268.

HIRAM BACON, *Register.*
By RANDALL WIXON, *Dep. Reg.*

STATE OF MICHIGAN, } ss:
County of Sanilac, }

I, Rudolph Papst, register of deeds for said county, do hereby certify that I have compared the foregoing copy of mortgage, bearing date the 10th day of November, A. D. one thousand eight hundred and fifty-three, and recorded in the said register's office on the 16th day of November, A. D. 1853, in liber one of mortgages, on pages 267 and 268, with the original record thereof now remaining

in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In witness whereof, I have hereunto set my hand and affixed the seal of the register's office, at Lexington, this 21st day of October, A. D. 1879.

[SEAL.] RUDOLPH PAPST,
Register of Deeds.

292 STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL *et al.*, Complainants,
vs.
FREDERICK S. AYRES *et al.*, Defendants.

I, John M. Cary, deputy county clerk of the county of Huron, and deputy register of the court aforesaid, do hereby certify that the foregoing is a true and compared copy of the original bill of complaint and answer of Frederick S. Ayres, J. S. Ayres, Charles G. Learned, and Ebenezer Wiswall. Also replication to the answers of Frederick & Jas. S. Ayres, Charles G. Learned, and Ebenezer Wiswall, and of the complainants' and defendants' testimony, taken before James A. Randall, of Detroit, except Exhibit J to D. C. Holbrook's evidence, on page 169, which is not in original, and Exhibit Q, on page 164, not in original, but found on page 89, marked Exhibit H; and also a part of the testimony of witnesses taken before Geo. C. Green, circuit court commissioner of Huron county, at Port Austin.

In witness whereof, I hereunto set my hand and seal, this 3rd day of May, A. D. 1880.

[SEAL.] JOHN M. CARY,
Dep'ty Register.

Endorsed: No. 2626. U. S. circuit court, eastern dist. of Mich. In equity. Charles E. Wiswall *et al. vs.* Fred. S. Ayres *et al.* Additional transcript of record. Filed May 13, 1880. A. Mandell, cl'k.

293 U. S. Circuit Court, Eastern District of Michigan. In Equity.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Compl'ts,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helf-

ferich, Jacob Brebner, Isabella Skene, and Bennett Richards, Defendants.

This cause belongs to 4th class, and is to be heard on pleadings and proofs at the coming term of court.

Oct. 19th, 1880.

Yours, RICHARD WINSOR &
D. C. HOLBROOK,
Compl'ts Solicitors.

To ADDISON MANDELL, *Register.*

Endorsed: 2626. U. S. C. C., E. D. of M. Equity. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Note issue filed October 19th, 1880. Jno. Graves, dep'y clerk.

294 STATE OF MICHIGAN:

In the Circuit Court of the United States for the Eastern District of Michigan.

CHARLES E. WISWALL
vs.
FREDERICK S. AYRES *et al.* } In Equity.

This cause belongs to the fourth class, and is to be heard on pleadings and proofs, and is entitled to priority from the 28th day of June, A. D. 1879.

Dated Detroit, Oct. 22nd, A. D. '80.

Yours, etc., JAMES H. HALL,
Solicitors for Deft. F. S. Ayres and J. S. Ayres.
ATKINSON AND ATKINSON,
Of Counsel.

To ADDISON MANDELL, Esq., *Clerk.*

Endorsed: No. 2626. U. S. cir. court, east. dist. of Michigan. In chancery. Charles E. Wiswall, complainant, *vs.* F. S. Ayres *et a.* Defendants' note of issue filed this 22d day of Oct., A. D. 1880. Jno. Graves, dep. cl'k.

295 In the Circuit Court of the United States for the Eastern District of Michigan.

CHARLE E. WISWALL *et al.*
vs.
FREDERICK S. AYRES *et al.* } In Equity.

The separate answer of the defendant, Ebenezer R. Ayres.

This defendant, saving all objections and exceptions to the complainant's bill, answering, says:

He denies that Ayres, Larned & Wiswall were, on the 27th day of January, 1869, or at any other time, indebted to Catherine A. Wiswall in the sum stated in said bill or any other sum, or that said bond and mortgage were given to secure the purchase price of said premises.

He denies that anything remains due upon said mortgage, and alleges that the same has been fully paid.

He neither admits nor denies the allegations of said bill, as to the giving of said bond and mortgage.

He admits that he is now the owner of an undivided quarter interest of the land described in said mortgage.

He denies all other allegations of said bill, and he prays to be hence dismissed with his reasonable costs and charges.

EBENEZER R. AYRES.

JAMES H. HALL,
Sol'r for E. R. Ayres.

Sworn to before me, and subscribed in my presence, by Ebenezer R. Ayres, the 2 day of February, 1881.

[SEAL.] WM. J. AFFLECK,
Clerk Court of Com. Pleas, Erie County, State of Ohio.

Endorsed: 2626. U. S. circuit court, east. dist. Mich. In equity. Chas. E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Answer of E. R. Ayres. Filed Feb'y 3d, '81. A. Mandell, cl'k.

296 In the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

CHARSES E. WISWALL *et al. vs.* FREDERICK S. AYRES *et al.*

In this cause it is stipulated that the separate answer of defendant, Ebenezer R. Ayres, is now received herein, and will be treated as having been replied to by general replication before the taking of any testimony in this cause, and duly noticed for hearing.

D. C. HOLBROOK,
Sol. Compl't.
JAMES H. HALL,
Sol. for Def't.
JOHN ATKINSON,
Of Counsel.

Endorsed: 2626. U. S. circuit court, east dist., Mich. In admiralty. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Stipulation. Filed February 7th, 1881. Jno. Graves, dept. clerk.

297 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room, in the city of Detroit, on Tuesday, the eighth day of February, in the year one thousand eight hundred and eighty-one.

Present: The Honorable Henry B. Brown, district judge.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, TUISCO G. WISWALL, and ANN E. BAERMAN, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants. } In Equity.

This cause now coming on to be heard upon pleadings and proofs is argued in part by counsel for the respective parties, and continued for further hearing.

298 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room, in the city of Detroit, on Wednesday, the ninth day of February, in the year one thousand eight hundred and eighty one.

Present: The Honorable Henry B. Brown, district judge.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants. } In Equity.

This cause again coming on to be heard upon pleadings and proofs, the arguments are concluded, and the cause is submitted for decision.

299 STATE OF MICHIGAN:

United States Circuit Court for the Eastern District of Michigan

CHARLES E. WISWALL *et al. vs.* FREDERICK S. AYRES *et al.*

This cause belongs to the fourth class, and is to be heard on pleadings and proofs, and is entitled to priority from the 11th day of Feb'y, A. D. 1881.

Dated Feb'y 11th, A. D. 1881.

Yours, etc., JAMES H. HALL,
Solicitor for F. S., James, & E. R. Ayres.
ATKINSON & ATKINSON,
Of Counsel.

To A. MANDELL, Esq., *Register*.

Endorsed: No. 2626. U. S. circuit c't, east. dist., Mich. In chancery. Charles E. Wiswall *et al.*, complainants, *vs.* Frederick S. Ayres *et al.*, defendants. Note of issue. Filed this 12th day of Feb'y, A. D. 1881. A. Mandell, cl'k.

300 CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, Ann E. Baerman,

vs.

FREDERICK S. AYRES, OTIS B. WILLIAMS, EBENEZER WISWALL, James Kerr, Charles G. Learned, Mark Carrington, James S. Ayres, August Schwarnitz, Ebenezer R. Ayres, Nicholas Kramer, Peter Smeader, Jr., Rufus Edmonds, John Wallace, Jr., James Ahearn, James Hall, Peter Patterson, John Deschamps, Samuel Parks, Albert Botowitz, John Babindererde, John Copeland, Charles Empkie, Leander Maybie, GeorgeH. Gregory, Julius Empkie, Jacob Helfferich, Frederick Empkie, James Brebner, The First Presbyterian Church of Port Austin, Michigan, Isabella Skene, Bennett Richards, Mitchell Legassa, Peter Wrobliski.

This cause having been heard on pleadings and proofs, and the same having been submitted to and considered by the court, it is adjudged that the complainants are entitled to a decree for the amount due on the bond and mortgage set forth in the bill in this cause; it is therefore ordered that it be referred to a master of this court to ascertain and report the amount due on said bond and mortgage, and that in computing the amount it be on the basis that only twenty-one thousand dollars was paid by said Catherine A. Wiswall, the mortgagee, on the sixth day of October, 1860, and to draw interest at the rate of seven per cent. to the date of his report. That the said master allow only as payments the amounts set forth in said bill up to the time of the filing thereof, and also any payments actually made since the filing of said bill.

And it is further ordered that the said master, from the pleadings and proofs on file, or such other evidence as may be offered before him, state whether at any time a sum of money was tendered by

said defendant, Ayres, to said complainant; and, if so, what sum was tendered; whether the same has been kept good; and, if so, in what hands.

And it is also ordered that the said master take proofs, ascertain and report the sales, if any have been made, by said mortgagors up to the time of filing the bill in this cause, of any part of the premises described in said mortgage, and that in doing so he set forth a particular description of the premises so sold, the date of each sale, the order of their dates, and that he also report and set forth by their descriptions the premises not sold by said mortgagors.

Endorsed: 2626. C. C. U. S., E. D. of Mich. In equity. Chas. E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Order of reference, &c. Order settled. John Atkinson. Entered and filed May 17th, 1881. A. Mandell, cl'k.

301 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Monday, the twenty-seventh day of June, in the year one thousand eight hundred and eighty-one.

Present: the Honorable Henry B. Brown, district judge.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants. } In Equity.

The motion of complainants, by Mr. Holbrook, their counsel, for amendment of the order of preference heretofore entered in this cause, now coming on to be heard, is argued by counsel for the respective parties and submitted.

302 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Wednesday, the twenty-ninth day of June, in the year one thousand eight hundred and eighty-one.

Present: The Honorable Henry B. Brown, district judge.

CHARLES E. WISWALL *et al.*
vs.
FREDERICK S. AYRES *et al.* } In Equity.

The complainants having made a motion to amend the order of reference to a master of this court to compute the amount due to the complainants, entered the 17th day of May, 1881, and said motion being argued by Mr. Holbrook for the complainant, and Messrs. Atkinson & Lothrop for defendants, and submitted to and considered by the court, it is now ordered that said order of reference be amended by inserting therein, next after the words "on the sixth day of October, 1860, and to draw interest at the rate of seven per cent," the words: "*and to be computed up to the 27th day of January, 1869, the date of the mortgage given to the said Catherine Wiswall, and that the amount of principal and interest then unpaid draw interest and it be computed at the rate of seven per cent.*"

Endorsed: 2626. Circuit court U. S. In equity. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Draft of order amending order of 17 May, 1881. Entered and filed in clerk's office June 29th, 1881. A. Mandell, clerk.

303 *Schedule A.*

1860				
Oct. 6.	Bond			$21,000 00
	Int. 7 p. ct. to Jan. 27, 1869, 8 y., 3 m., 21 d.			12,213 24
				33,213 24
	Int. 7 p. ct. to Feb. 27, 1872, 3 y., 1. m.			7,168 47
				40,381 71
1872.				
Feb. 27.	Payment			8,000 00
				32,3 81 7
	Int. 7 p. ct. to June 14, 1873, 1 y., 3 m., 17 ds.			2,940 48
				35,322 19
1873.				
June 14.	Payment			10,000 00
				25,322 19
1876.				
Apr. 3.	Payment, not equal to interest		$1,497 00	
May 1.	" " "		1,499 00	
Oct. 2.	" " "		1,197 00	
Nov. 3.	" " "		1,197 00	
1877.				
Oct. 29.	" " "		999 00	
	Int. 7 p. ct. to Dec. 14, 1877, 4 yr. 6 mo.			7,976 33
				33,298 52

1877.			
Dec. 14.	Payment	$5,000 00	
	Total payments		$11,389 00
			21,909 52
1878.			
Nov. 25.	Payment, not equal to interest	1,289 29	
	Int. to Oct. 10, 1881, 3 yrs., 9 mo., 26 da		5,862 03
			27,771 55
	Less pay't of Nov. 25, '78		1,289 29
	Amount due		$26,482 26

304 *Schedule B.—H. M. C., Master in Chancery.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Huron. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

In this case the bill of complaint was filed April 15th, 1879, the notice *lis pendens* was filed June 18th, 1879.

The order in which the lands should be sold is as follows: First. The lands yet owned by the defendants, Frederick S. Ayres and Ebenezer Wiswall, defendants and mortgagors, subject to contract of sale between them, and by Ebenezer R. Ayres and James S. Ayres, the defendants who bought subject to the payment of mortgage; to wit:

305

Description.	*Sec.*	*T. N.*	*R. E.*	*Acres.*	*100*
E fr pt of n e fl ¼	1	17	13	80	
N e ¼ of n e ¼	1	17	13	80	
E pt n e fl ¼	1	18	13	80	38
N e fl ¼ of n w fl ¼	3	18	13	45	60
W fl ½ of n w fl ¼	3	18	13	85	35
N pt of n e fl ¼	3	18	13	91	95
S e ¼ of s w ¼	3	18	13	40	

Description.	*Sec.*	*T. N.*	*R. E.*	*Acres.*	100
W ½ of s w ¼	3	18	13	80	
S w ¼ of s e ¼	3	18	13	40	
N ½ of n w ¼	4	18	13	80	
S ½ of n e ¼	4	18	13	80	
Se ¼	4	18	13	160	
All east of State road of N e of n e ¼	6	18	13		
S w ¼ of s w ¼	6	18	13	27	
E ½ of n e ¼ of n w ¼	6	18	13	20	
S e ¼ of s w ¼	6	18	13	40	
S w ¼ of s e ¼	6	18	13	40	
N w ¼ of n e ¼	6	18	13	40	
N w ¼ of n w ¼	7	18	13	40	
E ½ of n w ¼	7	18	13	80	
S ½ of s w ¼	7	18	13	80	
W ½ of n e ¼	7	18	13	80	
S w ¼ of s e ¼	9	18	13	40	
E ½ of s e ¼	9	18	13	80	
S e ¼ of s w ¼	9	18	13	40	
N w ¼ of s e ¼	9	18	13	40	
N e ¼ of	9	18	13	160	
N w ¼ of s w ¼	10	18	13	40	
W ½ of n w ¼	10	18	13	80	
E ½ of n w ¼	10	18	13	80	
S ½ of s w ¼	10	18	13	80	
W ½ of s w ¼	13	18	13	80	
N w ¼ of	15	18	13	160	
S w ¼ of s w ¼	15	18	13	40	
N e ¼ of s w ¼	15	18	13	40	
S e ¼ of s e ¼	17	18	13	40	
N pt of s w fl ¼	18	18	13	80	
S ½ of n w ¼	18	18	13	80	
N e ¼ of n e ¼	20	18	13	40	
S e ¼ of s e ¼	20	18	13	40	
N w ¼ of n w ¼	23	18	13	40	
N w ¼ of n w ¼	28	18	13	40	
N e ¼ of n e ¼	29	18	13	40	
E ½ of s e ¼	36	18	13	80	
S pt of s e fl ¼	22	19	13	80	
N w ¼ of n w ¼	27	19	13	40	
S e ¼ of n w ¼	28	19	13	40	
N w ¼ of s w ¼	29	19	13		
(Except lots sold and herein decreed to be sold in their order.)					
E pt of n w ¼	29	19	13	62	
W fl pt of s w fl ¼	6	17	14	82	16
N pt of n w fl ¼	7	17	14	81	78
306 N ½ of n e ¼	17	17	14	80	
N ½ of n w ¼	17	17	14	80	
W fl pt of n w fl ¼	6	18	14	76	66
W pt of s w fl ¼	19	18	14	69	44

	Description.	*Sec.*	*T. N.*	*R. E.*	*Acres.*	100
	S w ¼ of n e ¼	19	18	14	40	
	W ½ of n e ¼	19	18	14	80	
	E ½ of s w fl ¼	19	18	14	80	
	S e ¼ of n w fl ¼	19	18	14	40	
	N e ¼ of n w ¼	30	18	14	40	
	S w ¼ of s w ¼	31	19	14	40	
	N e ¼ of n e ¼	4	18	13		
	N e ¼ of n e ¼	5	18	13		
	S e ¼ of n e ¼	5	18	13		
	N e ¼ of s e ¼	5	18	13		
	N e ¼ of s e ¼	5	18	13		
	N e ¼ of n e ¼	8	18	13		
	S e ¼ of n e ¼	8	18	13		
	N ½ of n w ¼	9	18	13		
	W ½ of n w ¼	18	18	13		
	S e ¼ of s w ¼	32	19	13		
	S w ¼ of s w ¼	34	19	13		
	S e ¼ of s e ¼	36	19	13		

The following lands have been sold by the mortgagees and those who have purchased from them subject to the payment of the mortgage and are given in the inverse order of the allegation thereof with date of alienation and name of present owner thereof when known.

2. N w ¼ of s e ¼ 6, 18, 13, sold Leander Mayber, April 6, 1880, he is now owner, deed not recorded, but mortgage back is, after bill filed.

3. Lot 1, sec. 30, T. 19 N., of R. 13 E., described in mortgage as n e ¼ of s e ¼ of sec. 30, T. 19 N., R. 13 E., was mortgaged May 22d, 1879, to Frederick St. John Lockwood for $15,000, also after bill filed and before notice *lis pendens*, filed and recorded June 11th, 1879. Numerous lots have been sold out of this which appear in this list in the order of alienation, and therefore should be sold as lot 1 or the n e ¼ of s e ¼ of sec. 30, T. 19 N., of R., 13 E., excepting thereupon all lots sold therefrom prior to May 22d, 1879, as herein specified to be sold in the inverse order of their alienation.

4. The following lands were mortgaged to Allen Sheldon after he bill was filed and before notice *lis pendens* filed, mortgage dated May 22d, 1879, recorded June 9, 1879, and should here be sold in their order; am't of mortgage, $16,000.

		S.	*T.*	*R.*	*Acres.*	
	S w ¼ of n w ¼	28	19	13	40	
	W ½ of s w ¼	28	19	13	80	
	S w ¼ of s w ¼	29	19	13	40	
	W ½ of s e ¼	31	19	13	80	
	S e ¼ of s e ¼	31	19	13	40	
	S e ¼ of n e ¼	31	19	13	40	
	N ½ of n e ¼ of n e ¼	31	19	13	20	
307	N e ¼	32	19	13	20	160

	S.	T.	R.	Acres.
N w ¼ of s e ¼	32	19	13	40
N e ¼ of s w ¼	32	19	13	40
E ½ of n w ¼	32	19	13	80

5. W ½ of n e ¼ of n e ¼ sec 6, 18, 13, sold Peter Smeader, June 30th, 1878, and he owns.

6. E ½ of s e ¼ sec 14, 18, 13, sold Alexander McEachin, May 14th, 1878.

7. All that lot in the village of Port Austin, Michigan, on the west side of Lake street, 25 feet north and south by 100 feet east and west, beginning 54 feet north of north line of State street in lot 1, sec 30, 19, 13, sold to Richard Winser and Horace G. Snover, Nov. 1, 1877, and they now own.

8. All that lot in the village of Port Austin, Michigan, on the east side of Lake street, beginning fifty feet north of north line of Spring street, and running 50 feet north and south and 100 feet east and west, in lot 1 or n e ¼ of s e ¼ of sec 30, t 19 north, of range 13 east, and sold to Richard Wisner and Horace G. Snover, Nov. 1, 1877, who now own it.

9. North e ¼ of s e ¼ sec 1, t 18 n, of r 13 e, sold John Wallace, Jr., Sept. 7, 1877, and he now owns.

10. W ½ of n e ¼ sec, t 19 n, of r 13 e, sold James Hall, Dec. 27, 1876, and he yet owns.

11. All that lot on north side of Spring street in the village of Port Austin, Michigan, sold John Deschamps, Dec. 20, 1876, described as follows: 8 rods east and west by 16 rods north and south, next west of lot described in deed from Frederick S. James, Sr., and Ebenezer R. Ayres to Lambert Cheaybee, dated May 14, 1874, recorded Oct. 11, 1877, in liber 15 of deeds, at page 562, said lot being in n w ¼ of s w ¼ sec 29, 19, 13.

12. S w of n w ¼ sec 27, t 19 n, of r 13 e, sold Frederick Dimmel, April 4, 1876, he yet owns.

13. S e ¼ of s e ¼ of sec 33, 19, 13, sold Francis Balonski, Aug. 5, 1875.

The following lands deeded Charles G. Learned, one of the mortgagors, on Aug. 5, 1875, by defendants, Frederick S., James S., and Ebenezer R. Ayres, in part payment for his interest in the rest of the lands covered by this mortgage with other lands. A part of the contract being that Ebenezer R. Ayres should pay this mortgage, which contract was before then duly recorded, and hence should be sold here in the order of their alienation, to wit:

14. N w ¼ of n e ¼	sec.	12	18	12
S ½ of s e ¼	sec.	25	18	12
N ½ of n e ¼	sec.	36	18	12
W ½ of s e ¼	sec.	25	19	12
W ¼ of n w ¼	sec.	36	19	12
E ½ of n w ¼	2	27	19	13
N w ¼ of n e ¼	2	29	19	13
S e ¼ of n e ¼	2	29	19	13

	E ½ of s e ¼	2	29	19	13
	N e ¼ of s e ¼	2	31	19	13
	S ½ of n e ¼ of n e ¼	2	31	19	13
	S e ¼ of n w ¼	2	33	19	13
308	S e ¼ of s w ¼	2	34	19	13

15. S e ¼ of s e ¼ of sec 5, t 18 n, r 13 e, sold Albert Botomtz, June 8th, 1875.

16. S w ¼ of n e ¼ and s e ¼ of n w ¼ of sec 26, 19, 13, sold John Copeland, May 8th, 1875. He yet owns it.

17. All that lot in n w ¼ of s w ¼ of sec 29, 19, 13, near the Catholic church in Port Austin, Michigan, sold Leander Maybee, March 7th, 1875, described as "beginning on west side of highway, near Catholic church at southeast corner of lot, sold to Thomas Downie, thence south 4 rods, west 16 rods, north 4 rods, east 16 rods."

18. E ½ of s w ¼ sec 1, 18, 12, sold Julius and Frederick Empkie, who yet owns, Jan'y 25, 1875.

19. All that lot on south side of State street, in the village of Port Austin, Michigan, sold the First Presbyterian Church of Port Austin, Michigan, June 1, 1874, as follows: Being a strip 65 feet wide, next east of Samuel S. Robinson's plat of Port Austin, Mich., running from State street to the lot of Isabella Skene, 90 feet more or less.

20. Lots 10 and 12 on north side of Spring street, according to Ayres, Learned and Ayres' plat of the village of Port Austin, said lots being in n w ¼ of s w ¼ of sec 29, t 19 n, of r 13 e, sold Mitchell Legassa, May 14, 1874.

21. W ½ of s e ¼ of sec 33, t 19 n, of r 13 e, sold Simon and Valentine Horitzki, March 10, 1874.

22. S w ¼ of se ¼ of sec 32, t 19 n, of r 13 e, sold Peter Wrobliski, March 9, 1874, now owned by Jacob Coulter, and at time of filing bill.

23. All that lot in northeast corner of Lake and Spring street, in the village of Port Austin, Mich., being 50 feet north and south, by 100 feet east and west, sold Richard Winser and Robert W. Erwin Feb. 10, 1874, and owned at filing bill by Otis Williams and James Kerr.

24. All that lot in the village of Port Austin, Mich., on the northwest corner of Lake and State streets, 54 feet north and south by 100 feet east and west, sold Feb'y 9, 1874, to the Masonic Building Association of Port Austin, Mich., and now owned by Mark Carrington and Thomas Winser.

25. The n w ¼ of n e ¼ sec 4, t 18 n, of r 13 e, sold Dec. 25, 1873, to August Schwarnitz, who is the present owner.

26. The n w ¼ of s w ¼ sec 27, t 19 n, of r 13 e, sold Nicholas Kramer, Dec. 22, 1873, now owner.

27. All that lot on east side of Line street, in the village of Port Austin, Mich., in lot 1, or n e ¼ of s e ¼ of sec 30, t 19 n, of r 13 e, deeded to Nicholas Kramer, Dec. 22d, 1873, and now owned by him, described as commencing 80 feet south from the southeast corner of Line and Spring streets, and running easterly 114 feet, northerly

75 feet, thence westerly to Line street 114 feet, thence along east line of Line street north 75 feet to the place of beginning.

28. The s w ¼ of s w ¼ sec 9, t 18 n, of r 13 e. sold Rufus Edwards, Dec. 12, 1873, John G. Bodeman, now owner.

29. All that lot on southeast corner of Line and Spring street, in the village of Port Austin, Mich., sold Nicholas Kramer,
309 Sept. 18, 1873, being in lot 1, or n e ¼ of s e ¼ of sec 30, t 19 n, of r 13 e, and being 80 feet north and south, and 94½ feet east and west.

30. The s ½ of n w ¼ sec. 9, t 18 n, of r 13 e, sold Martin Yarrow, Aug. 8, 1873. He now owns it.

31. The n e ¼ of n e ¼ of sec. 13, t 18 n, of r 12 e, sold James Abram, July 18, 1873. He now owns it.

32. The west half s e ¼ sec. 7, 18, 13, sold Angus and Allen Kennedy, May 10, 1873. They yet own it.

33. The s e ¼ of s e ¼ 32, 19, 13, sold William Rogers, April 14, 1873, and he yet owns it

33½. The n w ¼ of n e ¼, 5, 18, 13, sold John Prill, March 28, 1873; deed dated March 28th, 1873; acknowledged Aug. 10, 1876. He now owns.

34. The n ½ of s w ¼ sec. 9, 18, 13, sold Samuel Parks, March 8, 1873. He yet owns it.

35. Lots 6 and 8 of Ayres, Larned and Ayres' platting of the village of Port Austin, Mich., being on the north side of Spring street and in the n w ¼ of s w ¼ sec. 29, 19, 13, sold Peter Patterson, Jan'y 4, 1873. He yet owns it.

36. The s ½ of n e ¼ sec. 6, 18, 13, sold Andrew Joretski, Nov. 27, 1872, and he yet owns it.

38. Six and $\frac{76}{100}$ acres on north side of old ridge road in n w ¼ of s e ¼ sec. 29, 19, 13, sold the board of health of the township of Port Austin, Huron Co., Mich., Aug. 29, 1872; was used as town burying ground, and described as follows: "Beginning at s e corner of s w ¼ of n e ¼ sec. 29, 19, 13, thence s to centre of said ridge road 10 and ½ rods, thence southwesterly along the center of said ridge road 57 & $\frac{4}{5}$ rods, thence north 29½ rods to the south line said s w ¼ of n e ¼ sec. 29, 19, 13, thence east along the south line of said s w ¼ of n e ¼ sec. 29, 19, 13, 53⅓ rods to place of beginning."

37. Six and $\frac{7}{100}$ acres on north side of old ridge road in n w ¼ of s e ¼ sec. 29, 19, 13, sold Richard Winsor, Aug. 29, 1872, owned by George Brown at filing bill, and described as follows: "Beginning at s w corner of s w ¼ of n e ¼ sec. 29, 19, 13, thence easterly along the south line of said lot 26⅔ rods, thence south 29½ rods to the center of the ridge road, thence southwesterly along the center of said ridge road 28 $\frac{3}{5}$ rods, thence north 38½ rods to the place of beginning."

39. The n ½ of s w ¼ sec. 7, 18, 13, sold John Babindererde, May 14, 1872. He yet owns it.

40. All of s w ¼ of s w ¼ sec. 6, 18, 13, west of the State road, being about 13 acres, sold Charles Empkie, April 29th, 1872, who yet owns it.

41. Lot 19, on east side of Lake street, of Ayres, Learned and Ayres' plat of Port Austin, Mich., in lot 1, or n e ¼ of s e ¼ sec. 30, 19, 13, sold April 1, 1872, now and at filing of bill owned by George H. Gregory.

42. The e ½ of s w ¼ sec. 26, 19, 13, sold William Nash, April 22d, 1872. He yet owns it.

43. The n w ¼ of n e ¼ sec. 18, 18, 13, sold Jacob Helfflich, March 16, 1872. He yet owns it.

44. All that lot on north side of Spring street in the village of Port Austin, Mich., in lot 1, or n e ¼ of s e ¼ sec. 30, 19, 13, sold Aug. 8, 1870, to Wm. Kennedy, and now owned by the estate of
310 John Cunningham, described as "commencing at a stake situate north 87¾ deg. east 54 feet from where the west line of lot No. 1, sec. 30, in township 19 n of r 13 e crosses the w line of Spring street, thence running north 87¾ deg. e 75 feet, thence n 2 deg. w 100 feet, thence s 87¾ deg. w 75 feet, thence s 2 deg. e 100 feet, to the place of beginning."

45. All that lot on west side of Lake street, in the village of Port Austin, bounded on the east by Lake street, on south by south line of lot 1, set. 30, 19–13; on the west by Samuel S. Robinson's plat of part of village of Port Austin; on the north by First Presbyterian Church of Port Austin's lot, and land of Frederick S., James S., and Ebenezer R. Ayres, and being on lot 1, sec. 30, 19–13, or n e ¼ of s e ¼, sec. 30.

46. Lot 1 of Ayres, Learned and Wiswall's plat of a part of the village of Port Austin, being lot on s e corner of Lake and Spring streets, sold Bennett Richards April 1st, 1869, and yet owned by him.

311 In the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

CHARLES E. WISWALL *et al.*, Complainants,
vs.
FREDERICK S. AYRES *et al.*, Defendants.

In pursuance of the authority and directions contained in an order made in the above cause, upon the 17th day of May, 1881, I, Henry M. Campbell, master in chancery of said court, do summon you, Frederick S. Ayers, Ebeneber Wiswall, Charles G. Leonard, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahern, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, to appear before me, at my office, room 35, Newberry & McMillan building, in the city of Detroit, on the 10th day of October, A. D. 1881, at 2.30 o'clock p. m., to attend a hearing before me, said mas-

ter, of the matters in reference in the said cause, to be had by virtue of said order above referred to.

And hereof fail not at your peril.

HENRY M. CAMPBELL,
Master in Chancery of the Circuit Court of the United States for the Eastern District of Michigan.

Under Writing.

To compute the amount due on the bond and mortgage set forth in the bill in said cause, also to ascertain whether any tender was made by defendant Ayres, and what sales have been made by the mortgagors of any part of the premises covered by the mortgage up to the filing of the bill.

I direct the above summons to be served four days before the return day thereof upon Messrs. Atkinson & Atkinson, solicitors for defendants.

HENRY M. CAMPBELL,
Master in Chancery.

312 EASTERN DISTRICT OF MICHIGAN, } *ss:*
County of Wayne, }

James S. Ayres, of said district and county, being duly sworn says that on the 5th day of October. A. D. 1881, he served the within summons on John Atkinson, Esq., one of the firm of Atkinson & Atkinson, solr's for said defendants, and in accordance with the direction above of the master issuing the within summons by showing to said John Atkinson this original and the signature of the master issuing the same, and leaving with him a true copy thereof, and of the underwriting hereunto subscribed.

JAS. S. AYRES.

Sworn to and subscribed before me, this 5th day of October, A. D. 1881.

CHARLES K. LATHAM,
Notary Public, Wayne Co. Mich.

Endorsed: In the circuit court of the United States, for the eastern district of Michigan. Charles E. Wiswell *et al. vs.* Frederick S. Ayres *et al.* Master's summons. Henry M. Campbell, master, in chancery.

313 *Report of Amount Due.*

The Circuit Court of the United States for the Eastern District of Michigan. In Equity.

CHARLES E. WISWALL *et al.*, Complainant,
vs.
FREDERICK S. AYRES *et al.*, Defendant.

To the circuit court of the United States, for the eastern district of Michigan. In equity:

In pursuance and by virtue of an order of this court made in

the above cause, dated the seventeenth day of May, A. D. 1881, amended June 29th, 1881, by which it was, among other things, referred to one of the masters in chancery of this court, to compute the amount due to the said complainant for principal and interest money on the bond and mortgage mentioned and set forth in the bill of complaint, filed in this cause, up to, and including the date of this report, and to ascertain whether any tender was made by defendant Ayres, and to determine what sales had been made by the mortgagors of the premises covered by the bill of complaint, and what lands remain unsold, and to report the same to this court with all convenient speed, I, Henry M. Campbell, master in chancery of this court, do respectfully certify and report, that I have computed the amount due to the complainant as aforesaid.

And I further certify and report, that there is due to the said complainants as aforesaid, for principal and interest up to and including the date of this report, the sum of twenty-six thousand four hundred eighty-two and 26,100 dollars ($26,482, 26-100.)

That Schedule B, hereto attached, contains a complete description of the lands sold, and the order of sale, and a description of the lands which remain unsold, and that said schedule was admitted by stipulation of counsel upon both sides to be correct, and is attached hereto by consent.

That upon the hearing, Mr. Holbrook appeared as counsel for complainants, and Mr. John Atkinson for defendants.

That upon June 12, 1879, there was due the sum of $22,912.21, and that upon said day a tender was made of $22,288.00, which tender was insufficint, not being equal to the amount then due.

And I further certify and report, that "Schedule A," hereto annexed, contains a statement and account of the principal and interest money due to the complainants as aforesaid, the period of the interest, its rate per cent., and the mode of computation to which I refer.

All of which is respectfully submitted,

HENRY M. CAMPBELL,
Master in Chancery of the Circuit Court of the United States for the Eastern Dist. of Michigan.

Dated the 10th day of October, A. D. 1881.

Endorsed: 2626. The circuit court of the United States for the eastern district of Michigan. In Equity. Charles E. Wiswall *et al.*, complainants, *vs.* Frederick S. Ayres *et al.*, defendants. Report of amount due. Filed in clerk's office Oct. 25, 1881. A. Mandell, clerk.

314 2626. Oct. 25, 1881. In Equity.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complanants,

vs.

FREDERICK S. AYERS, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayers, Ebenezer R. Ayers, Peter Smeader, Jr., John

Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, the First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

On the 25th day of October, 1881, came Henry M. Campbell, a master in chancery of this court, and filed his report, dated October 10, 1881, showing that there was due complainants from defendants on that day, the sum $26,482.26 for principal and interest.

A. MANDELL, *Clerk.*

315 At a session of the circuit court of the United States, for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room in the city of Detroit, on Monday the twenty-eighth day of November, in the year one thousand eight hundred and eighty-one.

Present: Honorable Henry B. Brown, district judge.

In the case between:

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants. } In Equity.

This cause came on to be heard, and was argued by counsel; and thereupon upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:

On reading and filing the report of Henry M. Campbell, one of the masters of this court, which report bears date the tenth day of October, in the year one thousand eight hundred and eighty-one, and was made in pursuance of an order of this court heretofore made in this cause, referring it to one of the masters of this court to compute the amount due to the complainant on the bond

and mortgage mentioned and set forth in the bill of complaint, from which it appears that there was due to the said complainants, at the date of said report, for said principal and interest, the sum of twenty-six thousand four hundred eighty-two dollars and twenty-six cents; and on reading and filing the affidavit of D. C. Holbrook, solicitor for complainants, showing the regularity of the proceedings in this cause, to take said bill of complaint as confessed; and on motion of Messrs. Winsor and Holbrook, counsel for the complainant, it is ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge, and decree that the said report, and all things contained therein, do stand ratified and confirmed. And it is further ordered, adjudged, and decreed that the said defendants pay or
316 cause to be paid to the said complainants or to their solicitors the amount so reported due as aforesaid, together with the interests and costs, on or before three months from this day; and in default thereof, that all and singular the said mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the complainants for the principal, interest, and costs in this case, and which may be sold separately, without material injury to the parties interested; be sold at public auction by or under the direction of a master of this court, at any time after the said three months; that the said sale be made at the front door, on Griswold street, of the United States post office building, in the city of Detroit, Michigan; that the master give public notice of the time and place of such sale, according to the course and practice of this court, and that the complainant or any of the parties in this cause may become the purchaser; that the master execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale; that the said master, out of the proceeds of said sale, pay to the complainants or their solicitors the costs in this suit to be taxed, and also the amount so reported to be due as aforesaid, together with the legal interest thereon, from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay off the same; and that the master take receipt for the amount so paid and file the same with his report; and that he bring the surplus moneys arising from said sale, if any there be, in the court without delay, to abide the further order of this court. And it is further ordered, adjudged, and decreed, that the defendants, and all persons claiming or to claim from or or under them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof; and it is further ordered that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties of this cause who may be in possession of said premises or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers thereof, on production of the master's deed for such premises, and a certified copy of the

order confirming the report of such sale, after such order has become absolute; and it is further ordered and decreed, that if the moneys arising from said sale shall be insufficient to pay the amount so reported due to the complainants, with interest and costs and expenses of sale as aforesaid, that said master specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report, the defendants, Frederick S. Ayres, Ebenezer Wiswall, and Charles G. Learned, who are personally liable for the debts secured by said mortgage, pay to
317 the complainants the amount of such deficiency, with interest thereon from the date of such report, and that the complainants have execution therefor; the description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the bill of complaint in this cause, are situated in the county of Huron, State of Michigan, and the same are to be sold in the order and as hereinunder numbered, to wit:

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Description.	*Sec.*	*T. N.*	*R. E.*	*Acres.*	100
E fr pt of n e fl ¼	1	17	13	80	
N e ¼ of n e ¼	1	17	13	80	
E pt n e fl ¼	1	18	13	80	38
N e fl ¼ of n w fl ¼	3	18	13	45	60
W fl ½ of n w fl ¼	3	18	13	85	35
N pt of n e fl ¼	3	18	13	91	95
S e ¼ of s w ¼	3	18	13	40	
W ½ of s w ¼	3	18	13	80	
S w ¼ of s e ¼	3	18	13	40	
N ½ of n w ¼	4	18	13	80	
S ½ of n e ¼	4	18	13	80	
S e ¼	4	18	13	160	
All east of State road of N e ¼ of n e ¼	6	18	13		
S w ¼ of s w ¼	6	18	13	27	
E ½ of n e ¼ of n w ¼	6	18	13	20	
S e ¼ of s w ¼	6	18	13	40	
S w ¼ of s e ¼	6	18	13	40	
N w ¼ of n e ¼	6	18	13	40	
N w ¼ of n w ¼	7	18	13	40	
E ½ of n w ¼	7	18	13	80	
S ½ of s w ¼	7	18	13	80	
W ½ of n e ¼	7	18	13	80	
S w ¼ of s e ¼	9	18	13	40	
E ½ of s e ¼	9	18	13	80	
S e ¼ of s w ¼	9	18	13	40	
N w ¼ of s e ¼	9	18	13	40	
N e ¼ of	9	18	13	160	
N w ¼ of s w ¼	10	18	13	40	
W ½ of n w ¼	10	18	13	80	
E ½ of n w ¼	10	18	13	80	
S ½ of s w ¼	10	18	13	80	

	Description.	*Sec.*	*T. N.*	*R. E.*	*Acres.*	100
	W ½ of s w ¼	13	18	13	80	
	N w ¼ of	15	18	13	160	
	S w ¼ of s w ¼	15	18	13	40	
	N e ¼ of s w ¼	15	18	13	40	
	S e ¼ of s e ¼	17	18	13	40	
	N pt of s w fl ¼	18	18	13	80	
	S ½ of n w ¼	18	18	13	80	
	N e ¼ of n e ¼	20	18	13	40	
	S e ¼ of s e ¼	20	18	13	40	
	N w ¼ of n w ¼	23	18	13	40	
	N w ¼ of n w ¼	28	18	13	40	
	N e ¼ of n e ¼	29	18	13	40	
	E ½ of s e ¼	36	18	13	80	
	S pt of s e fl ¼	22	19	13	80	
	N w ¼ of n w ¼	27	19	13	40	
	S e ¼ of n w ¼	28	19	13	40	
	N w ¼ of s w ¼	29	19	13		
	(Except lots sold and herein decreed to be sold in their order.)					
	E pt of n w ¼	29	19	13	62	
	W fl pt of s w fl ¼	6	17	14	82	16
	N pt of n w fl ¼	7	17	14	81	78
319	N ½ of n e ¼	17	17	14	80	
	N ½ of n w ¼	17	17	14	80	
	W fl pt of n w fl ¼	6	18	14	76	66
	W pt of s w fl ¼	19	18	14	69	44
	S w ¼ of n e ¼	19	18	14	40	
	W ½ of n e ¼	19	18	14	80	
	E ½ of s w fl ¼	19	18	14	80	
	S e ¼ of n w fl ¼	19	18	14	40	
	N e ¼ of n w ¼	30	18	14	40	
	S w ¼ of s w ¼	31	19	14	40	
	N e ¼ of n e ¼	4	18	13		
	N e ¼ of n e ¼	5	18	13		
	S e ¼ of n e ¼	5	18	13		
	N e ¼ of s e ¼	5	18	13		
	N e ¼ of s e ¼	5	18	13		
	N e ¼ of n e ¼	8	18	13		
	S e ¼ of n e ¼	8	18	13		
	N ½ of n w ¼	9	18	13		
	W ½ of n w ¼	18	18	13		
	S e ¼ of s w ¼	32	19	13		
	S w ¼ of s w ¼	34	19	13		
	S e ¼ of s e ¼	36	19	13		

The following lands have been sold by the mortgagees and those who have purchased from them subject to the payment of the mortgage and are given in the inverse order of the allegation thereof with date of alienation and name of present owner thereof when known.

2. N w ¼ of s e ¼ 6, 18, 13, sold Leander Maybee, April 6, 1880, he is now owner, deed not recorded, but mortgage back is, after bill filed.

3. Lot 1, sec. 30, T. 19 N., of R. 13 E., described in mortgage as n e ¼ of s e ¼ of sec. 30, T. 19 N., R. 13 E., was mortgaged May 22d, 1879, to Frederick St. John Lockwood for $15,000, also after bill filed and before notice *lis pendens*, filed and recorded June 11th, 1879. Numerous lots have been sold out of this which appear in this list in the order of alienation, and therefore should be sold as lot 1 or the n e ¼ of s e ¼ of sec. 30, T. 19 N., of R. 13 E., excepting thereupon all lots sold therefrom prior to May 22d, 1879, as herein specified to be sold in the inverse order of their alienation.

4. The following lands were mortgaged to Allen Sheldon after the bill was filed and before notice *lis pendens* filed, mortgage dated May 22d, 1879, recorded June 9, 1879, and should here be sold in their order; am't of mortgage, $16,000.

		S.	T.	R.	Acres.	
	S w ¼ of n w ¼	28	19	13	40	
	W ½ of s w ¼	28	19	13	80	
	S w ¼ of s w ¼	29	19	13	40	
	W ½ of s e ¼	31	19	13	80	
	S e ¼ of s e ¼	31	19	13	40	
	S e ¼ of n e ¼	31	19	13	40	
	N ½ of n e ¼ of n e ¼	31	19	13	20	
320	N e ¼	32	19	13	20	160
	N w ¼ of s e ¼	32	19	13	40	
	N e ¼ of s w ¼	32	19	13	40	
	E ½ of n w ¼	32	19	13	80	

5. W ½ of n e ¼ of n e ¼ sec 6, 18, 13, sold Peter Smeader, June 30th, 1878, and he owns.

6. E ½ of s e ¼ sec 14, 18, 13, sold Alexander McEachin, May 14th, 1878.

7. All that lot in the village of Port Austin, Michigan, on the west side of Lake street, 25 feet north and south by 100 feet east and west, beginning 54 feet north of north line of State street in lot 1, sec 30, 19, 13, sold to Richard Winser and Horace G. Snover, Nov. 1, 1877, and they now own.

8. All that lot in the village of Port Austin, Michigan, on the east side of Lake street, beginning fifty feet north of north line of Spring street, and running 50 feet north and south and 100 feet east and west, in lot 1 or n e ¼ of s e ¼ of sec 30, t 19 north, of range 13 east, and sold to Richard Winser and Horace G. Snover, Nov. 1, 1877, who now own it.

9. North e ¼ of s e ¼ sec 1, t 18 n, of r 13 e, sold John Wallace, Jr., Sept. 7, 1877, and he now owns.

10. W ½ of n e ¼ sec, t 19 n, of r 13 e, sold James Hall, Dec. 27, 1876, and he yet owns.

11. All that lot on north side of Spring street in the village of Port Austin, Michigan, sold John Deschamps, Dec. 20, 1876, de-

scribed as follows: 8 rods east and west by 16 rods north and south, next west of lot described in deed from Frederick S., James S., and Ebenezer R. Ayres to Lambert Cheaybee, dated May 14, 1874, recorded Oct. 11, 1877, in liber 15 of deeds, at page 562, said lot being in n w ¼ of s w ¼ sec 29, 19, 13.

12. S w ¼ of n w ¼ sec 27, t 19 n, of r 13 e, sold Frederick Dimmel, April 4, 1876, he yet owns.

13. S e ¼ of s e ¼ of sec 33, 19, 13, sold Francis Balonski, Aug. 5, 1875.

The following lands deeded Charles G. Learned, one of the mortgagors, on Aug. 5, 1875, by defendants, Frederick S., James S., and Ebenezer R. Ayres, in part payment for his interest in the rest of the lands covered by this mortgage with other lands. A part of the contract being that Ebenezer R. Ayres should pay this mortgage, which contract was before then duly recorded, and hence should be sold here in the order of their alienation, to wit:

14.	N w ¼ of n e ¼	sec.	12	18	12
	S ½ of s e ¼	sec.	25	18	12
	N ½ of n e ¼	sec.	36	18	12
	W ½ of s e ¼	sec.	25	19	12
	W ½ of n w ¼	sec.	36	19	12
	E ½ of n w ¼	2	27	19	13
	N w ¼ of n e ¼	2	29	19	13
	S e ¼ of n e ¼	2	29	19	13
	E ½ of s e ¼	2	29	19	13
	N e ¼ of s e ¼	2	31	19	13
	S ½ of n e ¼ of n e ¼	2	31	19	13
	S e ¼ of n w ¼	2	33	19	13
321	S e ¼ of s w ¼	2	34	19	13

15. S e ¼ of s e ¼ of sec 5, t 18 n, r 13 e, sold Albert Botonitz, June 8th, 1875.

16. S w ¼ of n e ¼ and s e ¼ of n w ¼ of sec 26, 19, 13, sold John Copeland, May 8th, 1875. He yet owns it.

17. All that lot in n w ¼ of s w ¼ of sec 29, 19, 13, near the Catholic church in Port Austin, Michigan, sold Leander Maybee, March 7th, 1875, described as "beginning on west side of highway, near Catholic church at southeast corner of lot, sold to Thomas Downie, thence south 4 rods, west 16 rods, north 4 rods, east 16 rods."

18. E ½ of s w ¼ sec 1, 18, 12, sold Julius and Frederick Empkie, who yet owns, Jan'y 25, 1875.

19. All that lot on south side of State street, in the village of Port Austin, Michigan, sold the First Presbyterian Church of Port Austin, Michigan, June 1, 1874, as follows: Being a strip 65 feet wide, next east of Samuel S. Robinson's plat of Port Austin, Mich., running from State street to the lot of Isabella Skene, 90 feet more or less.

20. Lots 10 and 12 on north side of Spring street, according to Ayres, Learned and Ayres' plat of the village of Port Austin, said lots being in n w ¼ of s w ¼ of sec 29, t 19 n, of r 13 e, sold Mitchell Legassa, May 14, 1874.

21. W ½ of s e ¼ of sec 33, t 19 n, of r 13 e, sold Simon and Valentine Horitzki, March 10, 1874.

22. S w ¼ of se ¼ of sec 32, t 19 n, of r 13 e, sold Peter Wrobliski, March 9, 1874, now owned by Jacob Coulter, and at time of filing bill.

23. All that lot in northeast corner of Lake and Spring street, in the village of Port Austin, Mich., being 50 feet north and south, by 100 feet east and west, sold Richard Winser and Robert W. Erwin Feb. 10, 1874, and owned at filing bill by Otis B. Williams and James Kerr.

24. All that lot in the village of Port Austin, Mich., on the northwest corner of Lake and State streets, 54 feet north and south by 100 feet east and west, sold Feb'y 9, 1874, to the Masonic Building Association of Port Austin, Mich., and now owned by Mark Carrington and Thomas Winser.

25. The n w ¼ of n e ¼ sec 4, t 18 n, of r 13 e, sold Dec. 25, 1873, to August Schwarnitz, who is the present owner.

26. The n w ¼ of s w ¼ sec 27, t 19 n, of r 13 e, sold Nicholas Kramer, Dec. 22, 1873, now owner.

27. All that lot on east side of Line street, in the village of Port Austin, Mich., in lot 1, or n e ¼ of s e ¼ of sec 30, t 19 n, of r 13 e, deeded to Nicholas Kramer, Dec. 22d, 1873, and now owned by him, described as commencing 80 feet south from the southeast corner of Line and Spring streets, and running easterly 114 feet, northerly 75 feet, thence westerly to Line street 114 feet, thence along east line of Line street north 75 feet to the place of beginning.

28. The s w ¼ of s w ¼ sec 9, t 18 n, of r 13 e. sold Rufus Edwards, Dec. 12, 1873, John G. Bodeman now owner.

29. All that lot on southeast corner of Line and Spring street, in the village of Port Austin, Mich., sold Nicholas Kramer,
322 Sept. 18, 1873, being in lot 1, or n e ¼ of s e ¼ of sec 30, t 19 n, of r 13 e, and being 80 feet north and south, and 94½ feet east and west.

30. The s ½ of n w ¼ sec. 9, t 18 n, of r 13 e, sold Martin Yarrow, Aug. 8, 1873. He now owns it.

31. The n e ¼ of n e ¼ of sec. 13, t 18 n, of r 12 e, sold James Abram, July 18, 1873. He now owns it.

32. The west half s e ¼ sec. 7, 18, 13, sold Angus and Allen Kennedy, May 10, 1873. They yet own it.

33. The s e ¼ of s e ¼ 32, 19, 13, sold William Rogers, April 14, 1873, and he yet owns it.

33½. The n w ¼ of n e ¼, 5, 18, 13, sold John Prill, March 28, 1873; deed dated March 28th, 1873; acknowledged Aug. 10, 1876. He now owns.

34. The n ½ of s w ¼ sec. 9, 18, 13, sold Samuel Parks, March 8, 1873. He yet owns it.

35. Lots 6 and 8 of Ayres, Larned and Ayres' platting of the village of Port Austin, Mich., being on the north side of Spring street and in the n w ¼ of s w ¼ sec. 29, 19, 13, sold Peter Patterson, Jan'y 4, 1873. He yet owns it.

36. The s ½ of n e ¼ sec. 6, 18, 13, sold Andrew Joretski, Nov. 27, 1872, and he yet owns it.

38. Six and $\frac{76}{100}$ acres on north side of old ridge road in n w ¼ of s e ¼ sec. 29, 19, 13, sold the board of health of the township of Port Austin, Huron Co., Mich., Aug. 29, 1872; was used as town burying ground, and described as follows: "Beginning at s e corner of s w ¼ of n e ¼ sec. 29, 19, 13, thence s to centre of said ridge road 10 and $\frac{1}{2}\frac{1}{5}$ rods, thence southwesterly along the center of said ridge road 57 & $\frac{14}{25}$ rods, thence north $29\frac{11}{25}$ rods to the south line said s w ¼ of n e ¼ sec. 29, 19, 13, thence east along the south line of said s w ¼ of n e ¼ sec. 29, 19, 13, $53\frac{1}{5}$ rods to place of beginning."

37. Six and $\frac{7}{100}$ acres on north side of old ridge road in n w ¼ of s e ¼ sec. 29, 19, 13, sold Richard Winsor, Aug. 29, 1872, owned by George Brown at filing bill, and described as follows: "Beginning at s w corner of s w ¼ of n e ¼ sec. 29, 19, 13, thence easterly along the south line of said lot $26\frac{3}{5}$ rods, thence south $29\frac{11}{25}$ rods to the center of the ridge road, thence southwesterly along the center of said ridge road $28\frac{3}{25}$ rods, thence north $38\frac{11}{25}$ rods to the place of beginning."

39. The n ½ of s w ¼ sec. 7, 18, 13, sold John Babindererde, May 14, 1872. He yet owns it.

40. All of s w ¼ of s w ¼ sec. 6, 18, 13, west of the State road, being about 13 acres, sold Charles Empkie, April 29th, 1872, who yet owns it.

41. Lot 19, on east side of Lake street, of Ayres, Learned and Ayres' plat of Port Austin, Mich., in lot 1, or n e ¼ of s e ¼ sec. 30, 19, 13, sold April 1, 1872, now and at filing of bill owned by George H. Gregory.

42. The e ½ of s w ¼ sec. 26, 19, 13, sold William Nash, April 22d, 1872. He yet owns it.

43. The n w ¼ of n e ¼ sec. 18, 18, 13, sold Jacob Helfflich, March 16, 1872. He yet owns it.

44. All that lot on north side of Spring street in the village of Port Austin, Mich., in lot 1, or n e ¼ of s e ¼ sec. 30, 19, 13, sold Aug. 8, 1870, to Wm. Kennedy, and now owned by the estate of John Cunningham, described as "commencing at a stake situate north $87\frac{3}{4}$ deg. east 54 feet from where the west line of lot No. 1, sec. 30, in township 19 n of r 13 e crosses the w line of Spring street, thence running north $87\frac{3}{4}$ deg. e 75 feet, thence n 2 deg. w 100 feet, thence s $87\frac{3}{4}$ deg. w 75 feet, thence s 2 deg. e 100 feet, to the place of beginning." 323

45. All that lot on west side of Lake street, in the village of Port Austin, bounded on the east by Lake street, on south by south line of lot 1, set. 30, 19–13; on the west by Samuel S. Robinson's plat of part of village of Port Austin; on the north by First Presbyterian Church of Port Austin's lot, and land of Frederick S., James S., and Ebenezer R. Ayres, and being on lot 1, sec. 30, 19–13, or n e ¼ of s e ¼, sec. 30.

46. Lot 1 of Ayres, Learned and Wiswall's plat of a part of the village of Port Austin, being lot on s e corner of Lake and Spring

streets, sold Bennett Richards April 1st, 1869, and yet owned by him.

Endorsed: 2626. Circuit court of the United States for the E. dist. of Mich. In equity. Chas. E. Wiswall *et al. vs.* Fred'k S. Ayres *et al.* Decree. Passed, signed, entered, filed in clerk's office November 28th, 1881. A. Mandell, clerk.

324 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court room in the city of Detroit, on Thursday, the twenty-ninth day of December, in the year one thousand eight hundred and eighty-one.

Present: The Honorable Henry B. Brown, district judge.

CHARLES E. WISWALL, WILLIAM MCA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

It appearing to the court that the record in this cause was improperly removed to the court from the circuit court for the county of Huron, in chancery, and that this court hath not jurisdiction of the cause, it is ordered that the proceedings had thereon in this court be and the same are hereby set aside and held for naught, and that the said cause be remanded to the said circuit court for Huron county in chancery, and that this cause be dismissed from this court for want of jurisdiction.

Endorsed: No. 2626. Cir. c't U. S. In equity. Wiswall *et al. vs.* Ayres *et al.* Order removing the record in this cause to Huron cir. ct. In chancery. Filed in clerk's office Dec. 29th, 1882. A. Mandell, clerk.

325 In the Circuit Court of the United States for the Eastern District of Michigan. In Chancery.

CHARLES E. WISWALL *et al. vs.* FREDERICK S. AYRES *et al.*

And now comes the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, and pray that an appeal may be allowed to the Supreme Court of the United States from the order of

this court setting aside all proceedings taken in this cause, and remanding the same to the circuit court for the county of Huron.

Detroit, Oct. 17th, 1883. JOHN ATKINSON,
Sol'r for said Defendants.

Endorsed: No. 2626. The U. S. circuit c't for the east. dist. of Michigan. In chancery. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Motion for leave to appeal to U. S. Supreme Court. Filed October 17th, 1883. Jno. Graves, dep'y clerk.

326 In the Circuit Court of the United States for the Eastern District of Michigan. In Equity. October 17, 1883.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa. Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahern, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants. } No. 2626.

And now comes the defendants, Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, and pray that an appeal may be allowed to the Supreme Court of the United States from the order of this court, setting aside all proceedings taken in this court, and remanding the same to the circuit court for the county of Huron.

Entered by clerk.

JOHN ATKINSON,
Solicitor for said Def'ts.

327 In the Circuit Court of the United States for the Eastern District of Michigan. In Chancery.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. LEARNED, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James

Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

ST. CLAIRE COUNTY, *ss:*

WILLIAM T. MITCHELL, of said county, being duly sworn, says that since the order of the circuit court of the United States for the eastern district of Michigan, in chancery, remanding the above-entitled cause to the circuit court for the county of Huron, in chancery, in the State of Michigan, he has been retained and acted as one of the counsel of the complainants; that since such remanding the defendant, Ebenezer R. Ayres, has, by his solicitor, John Atkinson, Esq., and under leave of the court first obtained, filed an answer in said State court in said cause, and several orders have been entered therein on the motion of the defendants' solicitor; that said cause was brought to hearing, and after full argumens by said defendants' solicitors, as well as the solicitor for the complainants, on the third day of January, 1883, a final decree was made and entered therein in favor of the complainants for the amount claimed to be due on the mortgage and bond mentioned in the bill of complaint, and for the sale of the mortgaged premises in default of payment of the amount found due, with interest and costs; that subsequently, and in pursuance of the statute of the State, the defendants, Frederick S., James S., & Ebenezer R. Ayres, by their said solicitor, then executing a bond, to which said solicitor was one of the sureties, appealed from said decree to the su-
328 preme court of the State of Michigan; that said cause was brought to hearing, and on full argument by counsel for said defendants as well as for the complainants submitted to said supreme court, and afterwards, and on the third day of October, 1883, the justice of said supreme court filed an opinion in all things affirming said decree. And a journal entry of such affirmance was duly entered, as deponent is informed and believes; that afterwards, on said defendants' solicitor asking for a modification of said decree, so as to extend the time for payment before the sale of said mortgaged premises, and on the suggestion of the court, complainants' solicitor prepared a formal decree of affirmance of said decree, and caused a copy thereof to be served on said defendants' solicitor, with a notice that it would be submitted to said supreme court for settlement, &c., on Tuesday, the 23d instant; that ever since said order remanding this cause to said State court as aforesaid, both parties without objection have treated it as properly in the State court, and that the circuit court of the United States for the eastern district of Michigan had no further control or jurisdiction over the same. WM. T. MITCHELL.

Subscribed and sworn, Oct. 20, 1883, before me.

WM. H. MITCHELL,

Notary Public, St. Clair County, Mich.

The above-named deponent, Wm. T. Mitchell, on his oath further says that he is compelled by business to be in Lansing on Tuesday next, and that he cannot change or postpone the same, and he also knows that prior to the notice that an appeal would be claimed from the order remanding this cause to said State court, Richard Winsor, complainants' counsel, had made arrangements to be at Lansing on Tuesday next, and that the business could not be postponed as deponent believes.

WM. T. MITCHELL.

Subscribed and sworn, Oct. 20, 1883, before me.

THOS. WELLMAN,
Notary Public, St. Clair County, Michigan.

Endorsed: 2626. Cir. ct. U. S. Equity. Charles E. Wiswall *et al. vs.* Frederick S. Ayres *et al.* Affidavit of W. T. Mitchell, for complt. Filed October 23d, 1883. Jno. Graves, dep'y clerk.

329 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room, in the city of Detroit, on Monday, the twelfth day of November, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Henry B. Brown, district judge.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, FrederickEmpkie, the First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Willhams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants. } In Equity.

In this cause the defendants having heretofore filed a petition for leave to appeal to the Supreme Court of the United States from the order remanding said cause to the circuit court for the county of Huron, and said petition having been duly submitted to the consideration of the court, it is ordered that said appeal be, and the same is hereby, allowed, and that said defendants give the usual bond on appeal in the sum of $1,000.

330 In the Circuit Court of the United States for the Eastern District of Michigan.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants,

vs.

FREDERICK S. AYRES, EBENEZER WISWALL, CHARLES G. Learned, James S. Ayres, Ebenezer R. Ayres, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, Frederick Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants. } In Equity.

THE UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the claim of appeal filed in this court in the above-entitled cause; that the above and foregoing are true copies of all papers filed and proceedings had and entered in said cause, appearing of record in my office; that I have compared the same with originals, and they are true and correct transcripts therefrom and of the whole of such originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this sixth day of December, in the year one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and eighth.

[SEAL.] WALTER S. HARSHA, *Clerk.*

331 *Assignment of Errors.*

United States Supreme Court.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, Complainants & Appellees,

v.

FREDERICK S. AYRSE, JAMES S. AYRES, EBENEZER R. AYRES, & EBENEZER Wiswall, Charles G. Learned, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, The First Pres-

byterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants & Appellants.

Now come the said Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

That the said circuit judge erred in remanding this cause from the circuit court of the United States for the eastern district of Michigan to the circuit court for Huron county, in chancery.

Therefore they pray that the order remanding said cause may be reversed and set aside and wholly held for naught.

JOHN ATKINSON,
Sol'r for said Def'ts, App'l'nts.

332 Endorsed: U. S. Supreme Court. Charles E. Wiswall *et al.*, compl'ts, *v.* Frederick S. Ayres *et al.*, def'ts. Assignment of error. John Atkinson, Detroit, Mich., sol'r for def'ts & app'l'ts.

333 United States Supreme Court.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Compl'ts and Applees,

vs.

FREDERICK S. AYRES, JAMES S. AYRES, EBENEZER R. AYRES, Def'ts and Appellants, and Ebenezer Wiswall Charles G. Learned, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahern, Peter Patterson, Samuel Parks John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants.

UNITED STATES OF AMERICA, *Eastern District of Michigan*, } *ss:*

JAMES H. HALL being duly sworn, deposes and says: That on the 12th day of December, 1883, he personally served upon Richard Winsor, the solicitor for said Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, and Ann E. Baerman, a true copy of the citation filed in this cause, and also a true copy of the assignment of error in said cause, (a true copy of each of which is hereunto annexed,) by delivering to and leaving with him the said copy.

JAMES H. HALL.

Subscribed and sworn to before me, this 13th day of December, 1883.

WM. H. MERRICK,
Notary Public, Huron Co., Mich.

334 United States Supreme Court.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, Tuisco G. Wiswall, and Ann E. Baerman, Complainants and Appellees,

v.

FREDERICK S. AYRES, JAMES S. AYRES, EBENEZER R. AYRES, & Ebenezer Wiswall, Charles G. Learned, Peter Smeader, Jr., John Wallace, Jr., James Hall, John Deschamps, Albert Botowitz, John Copeland, Leander Maybie, Julius Empkie, The First Presbyterian Church of Port Austin, Michigan, Mitchell Legassa, Peter Wrobliski, Otis B. Williams, James Kerr, Mark Carrington, August Schwarnitz, Nicholas Kramer, Rufus Edmonds, James Ahearn, Peter Patterson, Samuel Parks, John Babindererde, Charles Empkie, George H. Gregory, Jacob Helfferich, James Brebner, Isabella Skene, and Bennett Richards, Defendants and Appellants.

Assignment of Error.

Now comes the said Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

That the said circuit judge erred in remanding this cause from the circuit court of the United States for the eastern district of Michigan to the circuit court for Huron county, in chancery.

Wherefore they pray that the order so remanding said cause may be reversed and set aside, and wholly held for naught.

JOHN ATKINSON,
Sol'r for said Def'ts, Appl'nts.

335 Endorsed: U. S. Supreme Court. Charles E. Wiswall *et al. v.* Frederick S. Ayres *et al.* Assignment of error. John Atkinson, district Michigan, sol'r for def'ts and appellants.

336 UNITED STATES OF AMERICA, *ss:*

To Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco C. Wiswall, and Ann E. Baerman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday in October next, pursuant to a claim or appeal filed in the clerk's office of the circuit court of the United States, for the eastern district of Michigan, wherein Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres are appellants, and you are appellees, to show cause, if any there be, why the order in the said claim of appeal mentioned and referred to should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, chief justice of the United States, this fifth day of December, A. D. 1883.

HENRY B. BROWN,
District Judge.

337 Endorsed: Supreme Court of the United States. Frederick S. Ayres *et al.* Charles E. Wiswall *et al.* Citation. Copy. John Atkinson, att'y for appellants.

338 Endorsed: Supreme Court of the United States. Charles E. Wiswall *et al.*, compl's & appellees, *vs.* Frederick S. Ayres *et al.*, def'ts & appellants. Citation &c., & aff. of service. John Atkinson, appellants sol'r. Supreme Court U. S. 1883. October Term. No. 1229. Frederick S. Ayres *et al.*, appl'ts, *vs.* Charles E. Wiswall *et al.* Citation, with proof of service and assignment of errors. Office Supreme Court U. S. Filed Dec. 19, 1883. James H. McKenney, clerk. Filed 19th Dec'r, 1883.

Endorsed on cover: E. Michigan C. C. U. S. No. 1229. Frederick S. Ayres, James S. Ayres, and Ebenezer R. Ayres, appellants, *vs.* Charles E. Wiswall, William McA. Wiswall, Ebenezer S. Wiswall, Tuisco G. Wiswall, & Ann E. Baerman. Filed 15th December, 1883.

112 & 167

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JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884. No.

FREDERICK S. AYRES, JAMES S. AYRES and EBENEZER R. AYRES,

Appellants,

against

CHARLES E. WISWALL, WILLIAM MCA. WISWALL, EBENEZER S. WISWALL, TUISCO G. WISWALL, and ANN E. BAERMAN,

Appellees.

***APPEAL** from an order of the Circuit Court of the **EASTERN DISTRICT OF MICHIGAN**, setting aside for want of jurisdiction a final decree which it had previously entered, and remanding the cause to the State Court.*

JOHN F. DILLON AND
JOHN ATKINSON,
Attorneys for the Appellants.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1884. NO.

FREDERICK S. AYRES, JAMES S. AYRES and EBENEZER R. AYRES,
Appellants,

AGAINST

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, TUISCO G. WISWALL, and ANN E. BAERMAN,
Appellees.

Argument of JOHN F. DILLON and JOHN ATKINSON, for the Appellants.

This is an appeal from an order of the Circuit Court for the Eastern District of Michigan, setting aside for want of jurisdiction a final decree which it had previously entered, and remanding the cause to the State Court.

Record, p. 242.

Statement of Facts.

The suit below was a foreclosure bill originally brought by the appellees against the appellants and others, in one of the State Courts of Michigan.

The complainants, who allege themselves to be citizens of New York (Bill, Record, p. 55), are the children and assignees of their mother, Catharine A. Wiswall, the mortgagee.

Three classes of defendants were made to the bill of complaint.

First. The original mortgagors, Frederick S. Ayres, *Ebenezer Wiswall*, the father of complainants, and Charles G. Learned.

Second. Certain assignees of the mortgaged property, who had expressly assumed the payment of the mortgage, to wit, said Frederick S. Ayres, assignee of the interest of said Ebenezer Wiswall; James S. Ayres, assignee of part of the interest of Frederick S. Ayres in the mortgaged estate, and Ebenezer R. Ayres, assignee of said Charles G. Learned of the latter's interest in the mortgaged estate.

Third. Subsequent purchasers from mortgagors of sundry parcels of the mortgaged estate who did not assume the payment of the mortgage debt and who did not appear or defend the suit.

Fred. S. Ayres, a citizen of *Michigan*, who is one of the appellants and one of the original mortgagors and the assignee of the interest of Ebenezer Wiswall, filed an answer.

Record, p. 70.

In this answer, JAMES S. AYRES, a citizen of *Michigan*, one of the appellants and a subsequent purchaser from the said Fred. S. Ayres, of one-fifth interest in the mortgage estate who convenanted to pay his share of the mortgage debt, joined.

Record, p. 70.

The covenant of James S. Ayres appears in the record.

Record, p. 125.

EBENEZER R. AYRES, a citizen of *Ohio*, the other appellant, and who is the assignee of Charles G. Learned, one of the original mortgagors as stated *infra*, also filed by consent an answer *after* the removal of the cause into the Federal Court.

Record, pp. 219, 220.

These are the three appellants and *their said* ANSWERS set up as a defense that the *amount* named in the bond and mortgage, dated in 1869, was *greater* than the amount borrowed in 1860, for which the bond and mortgage were given, and also set up that *payments* had been made upon the bond and mortgage which were not credited or allowed in the bill of complaint.

I may observe, in passing, that the voluminous proofs, taken in the case and contained in the Record, all refer to these defenses, and were taken solely with reference to these issues made by, and only by, the appellants' answers, and that no other parties than the complainants and appellants were represented at the taking of the proofs.

At the time the mortgage in suit was executed, January 27th, 1869, the three mortgagors, to-wit, Frederick S. Ayres, Charles G. Learned and Ebenezer Wiswall, constituted the lumbering firm of Ayres, Learned & Wiswall of Port Austin, Michigan. It is so alleged in the bill, and in the title deed to the mortgagors of the mortgaged estate.

Record, pp. 59, 61, 116.

EBENEZER WISWALL, aforesaid, a citizen of *New York*, one of the partners of the said firm, had in 1860 loaned the said firm of Ayres, Learned & Wiswall, of which he was a member, money to the amount as the appellants' claim of only about $21,000, the exact amount, however, being one of the main points in controversy; and in 1869, he took for this loan the bond and mortgage in suit in the name of his wife, Catharine A. Wiswall; he and his said copartners joining in the execution thereof.

This bond and mortgage, his wife afterwards, February 25, 1874, assigned to the complainants, who are her children; who brought this suit in 1879.

Record, p. 58.

In 1871 (October 31st) said EBENEZER WISWALL left the firm and sold all his interest in and to the firm property and in *and to the mortgaged estate* to his copartner and co-mortgagor, the said Frederick S. Ayres, one of the appellants, the latter assuming to pay the mortgage debt, and giving to Wiswall a bond of indemnity. All this is alleged in the bill of complaint.

Record, pp. 59, 60, 61.

The mortgage in suit was executed January 27, 1869. On that same day the title to the property afterwards mortgaged was acquired by a Court Commissioner's deed (found in the record at page 116), which recites that it is made to "Frederick S. Ayres, Charles G. Learned, and Ebenezer Wiswall, composing the firm of Ayres, Learned & Wiswall."

Record, p. 116.

The record also shows that it was purchased and paid for as partnership property.

Bill, p. 58; Record, p. 116.

EBENEZER WISWALL, thus having many years before this bill was filed, to-wit, October 31, 1871, sold out his interest in the firm and in the mortgage estate, which was part of the firm assets, to his co-partner and co-mortgagor Frederick S. Ayres, and having no substantial interest in the matter, except to see that his children, the complainants, should recover as large a decree as possible, filed a *separate answer*, signed as counsel by the partner of the complainants' solicitor, CONTESTING NOTHING AND ADMITTING EVERYTHING IN THE BILL OF COMPLAINT SO FULLY that a decree thereon could at any time have been entered against him.

Record, p. 74.

Said WISWALL was subsequently examined by the *complainants* as a witness in their behalf in respecct of the issues raised by the answers of appellants.

Record, p. 132 *et seq.*

In 1874 (October 20), CHARLES G. LEARNED, a citizen of *Michigan*, one of the original co-partners and

co-mortgagors, sold and "did convey by deed" his interest in the firm *and in the mortgage estate* to EBENEZER R. AYRES (a citizen of *Ohio* and one of the appellants), subject to the mortgage in suit, which it was covenanted should be paid by *Ebenezer R. Ayres, F. S. Ayres, and A. S. Ayres* (who are the three appellants).

Record, p. 62.

LEARNED, whose wife, the testimony shows, was Mrs. Wiswall's sister (Record, p. 143), accordingly filed an answer, by the same counsel as Ebenezer Wiswall, *contesting nothing and admitting everything in the bill of complaint.*

Record, p. 72.

No other answers than the one above mentioned were filed in the State Court.

EBENEZER R. AYRES, purchaser and assignee of Learned, as above mentioned, and one of the appellants afterwards, by consent of complainants' solicitor, filed an answer in the Federal Court, setting up in substance the same defense as his co-appellants.

Record, pp. 219, 220.

REPLICATIONS were filed and the proofs were all taken before the stipulation hereinafter referred to allowing E. R. Ayres to answer.

THE PRESENT APPELLANTS filed in time and in due form a *petition and bond for removal of the cause* into the United States Circuit Court on the ground of citizenship.

Record, p. 5.

THE PETITION FOR REMOVAL alleges, *inter alia*, as follows:

"That said *complainants* are and were, at the time said suit was commenced, citizens of *New York*.

"That your petitioners, Frederick S. Ayres and James S. Ayres, are and were, when said suit was commenced, citizens of *Michigan*, and your petitioner, Ebenezer R. Ayres, is and was, when said suit was commenced, a citizen of *Ohio*.

"That in said suit, which is for the foreclosure of a mortgage on a large tract of land in the eastern district of Michigan, there is a controversy which is wholly between said complainants and these petitioners, and which can be fully determined as to them without the presence of the other defendants.

"That the matter in dispute in said controversy exceeds in value five hundred dollars, exclusive of costs."

The State Court "ORDERED *that the cause be transferred.*"

Record, p. 3.

The following tabulates the parties and their citizenship, as above shown:

Citizens of New York:	CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, TUISCO G. WISWALL and ANN E. BAERMAN, Complainants, now Appellees.	
	vs.	
Michigan	FREDERICK S. AYRES,	*Appellants, who now own the equity of redemption and deny amount of the indebtedness alleged in the bill.*
Michigan	JAMES S. AYRES,	
Ohio	EBENEZER R. AYRES,	
New York	EBENEZER WISWALL,	*Who have parted with their interest in the lands and admit the indebtedness alleged.*
Michigan	CHARLES G. LEARNED,	
Michigan	PETER SMEADER, JR.,	*Subsequent purchasers, who allowed the bill to be taken as confessed.*
Michigan	JOHN WALLACE JR., ET AL.,	
	Defendants.	

IT THUS APPEARS that all of the defendants were citizens of the States different from that of which the complainants are citizens, *except the father of the complain-*

ants, the said EBENEZER WISWALL, *whose relation to the cause has been already stated.*

The following is an outline of *what took place in the United States Circuit Court* after the removal of the cause.

March, 1880, transcript duly filed.
Record, p. 54.

October 19, 1880, *Complainant's* counsel file note of issue.
Record, p. 219.

February 3, 1881, stipulation of complainants' counsel filed allowing said Ebenezer R. Ayres, of Ohio, one of the appellants, to answer the bill in Federal Court.
Record, p. 220.

And such answer filed.
Record, pp. 219, 220.

February 8th, 1881, cause heard on pleadings and proofs.
Record, pp. 220, 221.

May 17, 1881, cause decided and interlocutory decree rendered, ordering reference to Master to ascertain amount of mortgage debt, &c.
Record, p. 222.

June 27, 1881, motion by *complainants'* solicitors to amend interlocutory decree.
Record, p. 223.

June 29th, 1881, motion granted.
Record, p. 224.

October 5, 1881, Master's summons issued at complainants' instance to appellants to attend hearing before the Master as to computation.
Record, p. 231.

October 25, 1881, Master's report filed.
Record, pp. 224, 233.

November 28, 1881, Master's report confirmed and final decree "settled, signed and enrolled."
Record, pp. 233, 242.

December 29, 1881, order remanding cause.
Record, p. 242.

THE INTERLOCUTORY DECREE adjudged that the complainants are entitled to a decree for the amount due on the bond and mortgage set forth in the bill, and it is therefore ordered that it be referred to the Master to ascertain and report the amount due.

Record, p. 222.

Afterwards the *complainants* procured this interlocutory decree to be amended so as to allow the Master to rest in the computation of interest at the time when the mortgage was given, to wit, on January 27th, 1869.

Record, p. 224.

The Master summoned the parties before him, and took and stated the account, and found and determined the priorities of the respective parties, and made a report, which will be found in the record.

Record, p. 224 *et seq.*

AT COMPLAINANT'S INSTANCE, as before stated, the Court affirmed the report and entered a decree for the complainants for $26,482.26.

THE DECREE recites:

"On reading and filing the affidavit of D. C. Holbrook, solicitor for complainants, showing the regularity

of the proceedings in this cause to take said bill of complaint as confessed; and *on motion of Messrs. Winsor and Holbrook, counsel for the complainants*, it is ORDERED, ADJUDGED and DECREED, and this Court, by virtue of the authority therein vested, doth order, adjudge and decree that the said report, and all things contained therein, do stand ratified and confirmed," &c., &c.

Record, p. 235.

The decree as entered was confirmed, and settles the rights and priorities of the respective parties, orders foreclosure and sale; and it was "passed, signed and enrolled" November 28, 1881.

Record, p. 242.

On December 29, 1881, the following ORDER REMANDING THE CASE was entered:

"It appearing to the Court that the record in this cause was improperly removed to the Court from the Circuit Court for the County of Huron, in chancery, and *that this Court hath not jurisdiction of the cause*, it is ORDERED that the proceedings had thereon in this Court be, and the same are, hereby *set aside* and held for naught, and that the said *cause be remanded* to the said Circuit Court for Huron County in chancery, and that this cause be dismissed from this Court for want of jurisdiction."

From this order setting aside the decree and remanding the cause, F. S. Ayres, James S. Ayres and Ebenezer R. Ayres, prayed for and were allowed an appeal.

Record, pp. 242–45.

The order of the Circuit Court, thus appealed from, does not disclose at whose instance or upon what grounds it was made. No written opinion was given; but in fact, although this is perhaps immaterial, it was

made at the suggestion of the complainants and upon the ground that the record disclosed the fact that *Ebenezer Wiswall, one of the original mortgagors and one of the defendants, was a citizen of the same State with the complainants.*

ASSIGNMENT OF ERRORS.

That the Circuit Court erred in remanding the cause.

Record, 247.

ARGUMENT.

If the Court please:

Every case concerning the limits and extent of the Federal jurisdiction is important; and, because it is so, I have examined with care the record of this cause to ascertain the precise state of facts it discloses, as well as the various removal decisions of this Court.

This case seems to me to be, after all, quite plain and of easy solution; and if such is your Honors' opinion, I fear you will not pardon the minuteness with which I shall discuss it. Your own judgments, hereinafter referred to, seem to me to establish the *removability* of this case under the first and second clauses of the second section of the Act of March 3, 1875. After examining the grounds and principles of your judgments on this subject, it would not have seemed to me that it would be justifiable to discuss this appeal at such considerable length if it had not appeared to the learned Judge of the Court below so plain as to justify him in making an *ex parte* order denying the juris-

diction of his Court—a mistake which he probably would not have fallen into if he had had the benefit of a full discussion at the bar. We are always in danger of going wrong whenever we attempt to dispense with the aid and guidance of argument.

After the suit had progressed to a final decree, which had been rendered at the instance of the complainants, the Circuit Court set aside the decree, and *remanded the cause to the State Court solely because Ebenezer Wiswall, one of the defendants, was a citizen of the same State with the complainants.*

The relation of Ebenezer Wiswall to the suit is shown by the bill, the answers and the record, and in the foregoing statement of facts. It may be briefly recapitulated thus:

First. The mortgage estate was originally the *partnership property* of Ayres, Learned & Wiswall. It was bought as such, and the money to make the purchase was loaned to the firm by Ebenezer Wiswall and constitutes the consideration of the mortgage debt, the evidence of which was the bond and mortgage in suit, which Ebenezer Wiswall directed to be taken in the name of his wife.

Second. The foreclosure bill brought by the children of said Ebenezer Wiswall, claimed the full amount of the bond as originally given, less certain specific credits set out in the bill. The bill sets up the sale of the mortgaged estate from Ebenezer Wiswall to Fred. S. Ayres, one of the appellants, and the latter's covenant to pay the mortgage debt; also the acquisition by Jas. S. Ayres, also one of the appellants, of an interest under said Fred. S. Ayres, and his covenant to pay his part of the mortgage debt; also Learned's conveyance

of all his interest to Ebenezer R. Ayres, the other appellant, and the latter's covenant to pay his portion of the mortgage debt. It asks for a decree of foreclosure against all of the mortgagors and subsequent purchasers and incumbrancers, and prays that the "portion of the mortgage premises, the title to which now stands in the original mortgagors, and of which lands F. S. Ayres holds a contract of sale of the interest of Ebenezer Wiswall, and James S. Ayres holds a contract of sale of a part of the interest of Frederick S. Ayres, shall first be applied to satisfy the debt," &c., and for a decree for any balance that may remain after exhausting the mortgage estate. There is no allegation in the bill that the security is slender, so as to raise the presumption of a deficiency.

THIRD. The *answer of* EBENEZER WISWALL (Record, p. 74) *admits* the case stated in the bill and makes no defense thereto—*admits* the sale, October 31, 1871, of his interest in the mortgaged estate to Fred. S. Ayres; *does not* set up any claim in the property for unpaid purchase-money, or otherwise; *insists* that the appellants have been, since October 31, 1871, the principal debtors; *asks* to have his vendee Fred. S. Ayres, "substituted" for himself "so far as the payment of the mortgage is concerned," and for a decree against appellants which will protect him from the mortgage, and for costs (Record, p. 74).

THE ANSWERS of the appellants contested the amount due on the mortgage, *and raised the only issues of fact in the suit* (Record, pp. 70, 219).

FOURTH. At the time the bill was filed neither Wiswall nor Learned, two of the original mortgagors, had any interest in the mortgage estate—their interests being held by the appellants.

FIFTH. The answer, therefore, of Ebenezer Wiswall while making no controversy with the complainants, created one as to the appellants and particularly with his vendee, Fred. S. Ayres. Let it be borne in mind, therefore, *first*, that the record affirmatively shows that there was no contest, issue, controversy or dispute of any kind between the complainants and Ebenezer Wiswall, who substantially disclaimed all interest; *second*, that the only controversy of the complainants with the appellants was that set up in the answers of the appellants concerning the amount due on the mortgage; *third*, that Ebenezer Wiswall in his answer asked for a decree that would protect him as against the appellants and for his costs.

The only controversy, therefore, was between the complainants, citizens of New York, on the one side, and the appellants, citizens of Michigan and Ohio, on the other; and one (principally of law) between Ebenezer Wiswall, a citizen of New York, on the one side, and the appellants, citizens of other States, on the other.

UPON THIS STATE OF FACTS the question is whether the case was removable at the instance of the appellants, citizens of Michigan and Ohio, to the Circuit Court; AND WE MAINTAIN THAT IT WAS REMOVABLE BOTH UNDER THE FIRST AND SECOND CLAUSES OF THE SECOND SECTION OF THE ACT OF MARCH 3, 1875.

BEFORE PROCEEDING to examine the Removal Act and the decisions construing it, let us more precisely fix the status and relation of Ebenezer Wiswall as respects the complainants and the appellants.

We maintain that the record shows but one fact-con-

troversy, viz., between the appellants and complainants, which controversy was—how much appellants owed complainants, to which controversy Ebenezer Wiswall was no party at all; if so, only a nominal party; at all events not an indispensable party; and that he ranged himself both in respect of the suit and the controversy arising therein on the part of the complainants.

Ebenezer Wiswall having sold all his interest in the mortgaged estate and the appellants as the purchasers having, as part of the purchase price, assumed to pay the mortgaged debt, it results, of course, that *as between Wiswall and the appellants* the latter became the *principal debtors* in respect of the mortgaged debt and the former only a *surety* therefor. So are all of the authorities.

It may, perhaps, be regarded as open to consideration whether Ebenezer Wiswall does not remain, notwithstanding such sale and assumption, *a principal debtor as respects the complainants*, even after the complainants had knowledge of such sale and assumption.

This general question has been the subject of many decisions in Great Britain and this country. I am not aware of any judgment of this Court upon the precise point; and the Court may not find it necessary on this record to decide it.

The English law is now settled by the concurring judgment of the Queen's Bench, Court of Chancery, and the House of Lords to the effect that even as *respects the complainants*, the appellants became by their purchase and assumption the principal debtors and Wiswall a surety.

The English and American cases are cited *In re*

Goodwin, 5 Dillon, C. C. Rep., 140, and in the note thereto, to which the Court is referred, if it shall have occasion to consider the subject.

It is a settled rule in the law of mortgages that a mortgagor who has sold and conveyed his interest in the mortgage estate is not a necessary party to a foreclosure suit; he is at most, if he remains personally liable for the debt, a proper party defendant at the instance of the creditor if the latter wants a judgment for any deficiency after exhausting the pledge.

The rule as laid down in Jones on Mortgages, section 1403, "that if the mortgagor retains an interest in the property such that he may again become possessed of the equity of redemption he must be made a party," is undoubtedly the correct one.

As stated in the succeeding section, "the mortgagor after he has conveyed the whole of the premises mortgaged is not a necessary party to the suit," is equally well sustained by the authorities, many of which are cited by Mr. Jones.

Therefore, while Mr. Wiswall was at most a proper party, he was not a necessary one. The suit might have been brought and prosecuted without him.

The bill and answers all show that Wiswall had sold the mortgaged estate. This was in 1871. It was sold on a short credit. The answer of Ebenezer Wiswall sets up no claim for any unpaid purchase money. On the contrary, he disclaims any interest in the mortgaged estate. It therefore appears that he has been fully paid therefor by his vendee, Fred. S. Ayres.

(*a*) In equity, this land having been purchased with partnership funds for partnership purposes, and the title taken to all the partners, it was, as between the

copartners, *personal estate*, and the sale and payment vested in the purchaser a complete title thereto without any further conveyance; or, if any further conveyance was necessary, the vendee could compel it to be made.

Shanks vs. Klein, 104 U. S., 18, 1881.

(*b*) Again: by the statute of Michigan, even if the land be regarded as real and not personal property, the effect of the sale before payment was to make the vendor a trustee of the legal title for the benefit of the vendee, who would be entitled thereto on payment of the purchase price, and, on such payment being made, the statute of Michigan *executed the use* and vested the vendee with the legal title without any further conveyance.

By the statutes of Michigan, "Every person who, by virtue of any grant, assignment or devise, shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest."

Comp. Laws 1871, Sec. 4116, p. 1330.

Ayres, upon payment, became the full equitable owner, and this equitable ownership, by the statute, was converted into a legal estate.

Ready vs. Kearsley, 14 Mich., 215.

Wiswall ceased to have any interest in the property, and was not, therefore, a necessary party.

But, even if the use was not executed, the vendor had at most the bare legal title which he held in trust for the vendee, to which right the purchaser, under a

foreclosure decree, would succeed just as well in case such a vendor was not a party to the decree as if he were such party. His interest, if he had any at all, would, in any view, be nominal.

It results from the foregoing that, at the time this foreclosure bill was brought:

1. That Ebenezer Wiswall had no title or estate in mortgaged property. The bill and the disclaimer in his answer so shows; and he was not, therefore, a necessary party to the bill, and, at most, only a proper party defendant at the instance of the complainant, for the purpose of a contingent decree to pay any deficit, after exhausting the pledge, and after default of the appellants, as principal debtors, to pay such deficit.

2. That, as respects both the complainants and Ebenezer Wiswall, the appellants were the principal debtors, and Wiswall was only a surety. The principal debtors were, therefore, the real, and, indeed, the only defendants actually interested in the suit. They only were primarily and ultimately liable. They were the sole owners of the mortgaged property. It is not to be feared, I think, that this Court will hold that the right of principal debtors to the benefit of the federal jurisdiction can be defeated because their surety is a citizen of the same State as the creditor. And reduced to its last analysis, that is this case.

After thus showing Ebenezer Wiswall's relation to the complainants and the appellants, and that there was but one substantial controversy in the suit, and that was between the complainants and appellants, and

that in this controversy Wiswall, by his pleadings, arranged himself on the side of his children, the complainants, and against the appellants, I proceed to examine the decisions of this Court, with a view of showing that, on the grounds and principles thereof, this cause was removable under section 2 of the Act of 1875.

This section allows civil suits to be removed "in which there shall be a controversy between citizens of different States. * * * And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either *one or more* of the plaintiffs *or defendants* actually interested in such controversy may remove said suit."

As to the removability of the cause under the first clause of the second section.

Appellants maintain that the case at bar is fully covered in principle by the judgment of this Court in the "Removal Cases," (100 U. S., 457)—the leading case construing the first clause:

In those cases, a Construction Company of *Iowa* brought a foreclosure suit in equity against a railroad company of *Iowa* to recover a debt and enforce a mechanic's lien; making defendants the Railroad Company and mortgage Trustees of the Railroad Company, which Trustees were citizens of *Pennsylvania* and *Ohio*. As between the plaintiff and the Railway Company, the controversy was as to the amount due the Construction Company and the existence of the lien, and as between the Construction Company and the Mortgage Trustees, the controversy was as to the priority of the

mechanic's lien over the mortgage. It was held that the Trustees might remove the whole suit under the *first* clause of section 2 of the Act of March 3, 1875, the second clause not being passed on.

The Court proceeded upon the ground that it was its duty in applications for removal under the Act of 1875, to analyze the transactions brought into view in the pleadings, and "to ascertain the matter in dispute, and then to arrange the parties on opposite sides of *that dispute*," irrespective of the "position they occupied as plaintiffs or defendants in the suit" (pps. 468, 469). On decomposing the transactions, the Court found the two controversies above mentioned. And the first dispute, viz., the one between the Construction Company and the Railroad Company, having been disposed of before the application of the Trustees for the removal of the suit, there was but one substantial dispute left, viz., between the Construction Company of Iowa and the mortgage Trustees of other States. *The Railroad Company of Iowa was a party to the suit, and would be bound by the decision.* It was, of course, a necessary party to the suit, and had been made such by the plaintiff, the Construction Company. Referring to this, the Supreme Court, by Mr. Chief Justice WAITE, says (p. 469):

"If the Railway Company still continued a party to the suit, it was a NOMINAL PARTY only, and its interests were in no way connected with those of the Trustees. It did not, therefore, occupy a position in the controversy on the same side with them. This being the case, it is apparent that in the then condition of the suit the only controversy to be settled was between the mortgage Trustees, citizens of Pennsylvania and Ohio on the one side, and the Construction Company and the Railroad Company, citizens of Iowa, on the other;"

and this although the Trustees had no cross bill and were simply defending against the claim of the Construction Company.

The principle of this case is, that the Court will first ascertain from the record and pleadings the actual, real, substantial controversy, and then if all the persons on one side of that controversy (whether plaintiffs or defendants) are citizens of different States from those on the other side of the *same* controversy (whether plaintiffs or defendants), the case is removable under the *first* clause. The principle of that case applied here makes the case at bar removable under the first clause, for certainly the Railway Company in that case, which was the common debtor and the holder of the legal title, was no more a nominal party than Ebenezer Wiswall in this case.

And that case would equally have been removable if the Railroad Company had (as Wiswall has here done) filed an answer admitting the bill of complaint, although no decree had been rendered against it on that answer; and this for the reason that on the filing of such an answer, there would be no issue or controversy in the case as respects the defendant filing it.

I submit that if the State could had rendered a decree against Wiswall on his answer confessing the complainants' bill, the only controversy would be like that in the Removal Cases, that is a controversy wholly between citizens of different States. The case at bar would have presented more difficulty if Wiswall had joined the appellants in their defenses or had raised any substantial controversy with the complainants.

I am of opinion also that the removability of this

case under the first clause of the second section, clearly appears from the next case of importance, which involved the question with which we are dealing, namely, the case of the Pacific R. R. vs. Ketchum (101 U. S., 289).

It may shortly be stated thus:

Ketchum, a citizen of *New York*, holding third mortgage bonds of the Pacific R. R. of *Missouri*, of which mortgage Vail and Fish, both citizens of *New York*, were trustees, brought a foreclosure bill in the United States Circuit Court for *Missouri*.

He made defendants:

1. Vail and Fish, trustees, citizens of New York (the State of complainant's citizenship).

2. Prior mortgage trustees, also citizens of New York.

3. Prior mortgage trustees, citizens of New York and Missouri.

4. Prior mortgage trustees, citizens of Missouri.

5. The common debtor and mortgagor, the Pacific Railroad of Missouri.

The bill admitted the prior mortgages, and did not contest the same.

As to Vail and Fish, the trustees of the mortgage whereof foreclosure was sought and who were indispensable parties to the suit, and who were citizens of the same State with the plaintiff, the bill alleged their refusal to bring the action. Vail and Fish answered admitting such refusal, but "substantially availed themselves of the suit which had been begun." Although this case arose under section 1 of the Act of 1875, the Court say that the "same general language is used" as

in the second section: cites the *Removal Cases* (100 U. S., 457) as applicable, and says that "it is sufficient that the Court had jurisdiction when the decree appealed from was rendered," and holds that it had jurisdiction to render the decree, notwithstanding the common citizenship of the plaintiff and the trustees, Vail and Fish. As to them the Court says:

"Although nominally defendants, according to the pleadings, they voluntarily, in the course of the proceedings, arranged themselves on the same side of the subject-matter of the action with the complainants" (p. 299).

How arranged themselves on the same side? By an answer precisely like the answer of Eb. Wiswall in the case. Mark the language. Arranged themselves not as co-plaintiffs on the record, for they did not, but "on the *same side of the subject matter* of the action," though still remaining as defendants on the record in the suit.

The principle of this case in view of the analogous state of facts is especially applicable to the case now under consideration and controls it.

SUBMITTING, THEREFORE, that the case at bar falls within the adjudged meaning of the *first* clause, I now proceed to show that, if mistaken in this, that it falls within the *second* clause, which was intended to *enlarge* the right given in the first clause, and will be deprived of its intended effect if it is not so construed and applied.

As to the removability under the second clause of the second section.

If fair doubt could exist as to the removability of the case at bar, it seems to me that it is removed by the language of the *second* clause. If it were necessary to my client's case here to maintain that one or two judgments of this Court under the second clause had put too narrow a construction upon it, I should respectfully ask to present some further suggestions to to the Court thereon; but since a critical examination of these cases shows nothing inconsistent with the federal jurisdiction over the present case, but sustains it, I consider it only necessary to call attention to what has been decided, and to show that, consistently with these decisions and within their principles, this case is one of federal cognizance. The second clause proceeds on the assumption that causes, and particularly equity causes, may embrace several distinct and separable controversies.

Barney vs. Latham, 103 U. S., 205, 212, per HARLAN, J.

It provides, as construed, that if, in any given case, there is *a* distinct and separable controversy in which the indispensable parties to such controversy are citizens of different States, then any one or more of the plaintiffs or defendants having an interest in such controversy may remove the suit.

THE FIRST AND LEADING CASE upon the meaning of the *second* clause is Barney v. Latham (103 U. S., 205). In that case the plaintiff claimed to be the equitable owner of certain lands. The individual defendants holding at the time the legal title, had sold certain of

the lands; and afterwards conveyed the residue to the corporate defendant, which, it was admitted, took them charged with the trust in plaintiff's favor if any trust existed: one of the plaintiffs and the corporate defendant were citizens of the *same* State. The plaintiffs prayed:

1st. That the individual defendants should account in respect of sales made prior to the conveyance to the corporate defendant.

2d. That the equitable rights of the plaintiffs as against the corporate defendant (which held the *legal* title) be established, and that the corporate defendant be also required to account to the plaintiffs in respect of lands sold since it acquired the title. It was held that the individual defendants, who were citizens of States different from plaintiffs, had, under the pleadings, a distinct and separable controversy with the plaintiffs and could remove the cause, even if the corporate defendant was a proper party to the cause and could not have itself removed it.

Mr. Justice HARLAN throughout the opinion draws and enforces the distinction between "proper" parties to a controversy, and "indispensable" parties thereto; the mere existence of a common citizenship of a "proper" party will not, while the existence of such citizenship of an "indispensable" party to such controversy, will defeat the Federal jurisdiction. In this case it will be seen that the legal title of the lands in dispute was in the corporate defendant against whom substantial relief was

> asked in the bill; and yet as the plaintiffs had a distinct controversy with the individual defendants in respect of the same lands (to which controversy the corporation although clearly a proper, was not a necessary, party) the case was held to be removable under the second clause, by reason of such separable controversy. In other words for purposes of removal under this clause a controversy may be separable, although a proper, though not necessary, party to such separable controversy be a citizen of the same State with the parties against whom the removal is sought. But in the case at bar Ebenezer Wiswall was not even a nominal party to the controversy made by the pleadings between the complainants and appellants. He was no party thereto at all: and his presence or absence was immaterial as to such controversy. He did not make it, or join it and it did not concern him.

That THE DISTINCTION drawn in Barney vs. Latham is between "*proper*" and "*indispensable*" parties clearly appears in the case of Blake vs. McKim, decided a few days later (103 U. S., 336). It is to be regretted, I think, that the Court in construing the phrase "a controversy between citizens of different States" has in effect inserted by judicial construction the word "exclusively." If this restricted construction is to be followed by another, to the effect that any other than the common citizenship of an *indispensable* party to the *specific and separable controversy* will defeat the Federal jurisdiction, that jurisdiction will be seriously maimed.

THE NEXT CASE specially bearing upon this question is Hyde vs. Ruble (104 U. S., 407). The plaintiff, a citizen of *Minnesota*, sued upon a contract of bailment made by the three defendants as copartners. One of the defendants was a citizen of *Minnesota*; the other two were citizens of other States. All three defendants denied the partnership and pleaded performance, and thereupon sought to remove the case. On the distinct ground that "this suit presents but a single cause of action, that is to say, a single controversy; that the issues made by the pleadings do not create separate controversies, but only show questions which are in dispute between the parties as to *one* controversy" it was held not to be removable.

It will be seen that there was here but one issue, *partnership and performance or not*, and that this issue was made by the pleadings (both by complaint and the answers) as to *all* of the defendants.

If the Minnesota defendant in this case had, like Ebenezer Wiswall in the case at bar, filed an answer contesting nothing and admitting everything in the complaint, and the non-resident defendants, separately defending, had applied to remove the cause, it cannot be doubted, I think, that it would have been removable.

THERE ARE TWO CASES in 106 U. S. which may be briefly referred to. In Bacon vs. Reeves, 106 U. S., 99, 1882, *cestuis que trust* sued their trustee for an accounting and a decree for the amount due them, and as the trustee the main defendant, had an interest in the undistributed estate of his father, the father's executors were made defendants and attachments served upon

them and levied upon the interest of the main defendant in his father's estate. As the *cestuis que trust* and the main defendant were citizens of different States, it was held that the cause was removable although the plaintiffs and the executors were citizens of the same State. The Court considered that the executors were substantially garnishees and were "neither *necessary* nor *indispensable* parties to the controversy which is the foundation of the litigation."

Bacon vs. Reeves, 106 U. S., 99, 1882.

In Frazer vs. Jennison, 106 U. S., 191, 1882, the facts were these: The executors of a last will, all of whom were citizens of the State of *Michigan*, propounded the will for probate. Seven heirs-at-law *jointly* gave notice of their contest of the will—one of these heirs was a citizen of *Illinois*, one of *Iowa*, and the others of *Michigan*. The citizens of Iowa and Illinois filed a petition for removal under act of 1875: *Held* that such a proceeding presented but a single issue, to wit, *will or no will*, and that the cause was not removable. The case falls, the Court said, within the principle of the Removal Causes (100 U. S., 457), and Blake vs. McKim, (103 U. S., 205, 336), and not of Barney vs. Latham, (103 U. S., 205.)

In deciding Frazer vs. Jennison, Mr. Chief Justice WAITE says (p. 194):

"To entitle a party to a removal under the second clause of the second section of the act there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded, as to such cause of action, with all the parties on one side of that controversy, citizens of different States from those on

the other (Hyde vs. Ruble, 104 *id.*, 407). *To say the least, the case must be one capable of separation into parts so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of the other States on the other, which can be fully determined without the presence of any of the other parties to the suit, as it has been begun.* Such is not this case. As was said by the Supreme Court of Michigan, in this very contest, when an application was made for a mandamus to compel the Circuit Court to set aside an order consolidating the two appeals, the probate of every will, whether in the original or appellate tribunal, must always be single and complete in one hearing. It would be absurd to have such proceedings severed so that the will might be held good as to one class of contestants and bad to another. No matter how many different persons may appeal they can only raise one issue, and there can be but one trial of that issue which is to determine the question of will or no will. * * * *The contest was joint when it was begun.* It was joint after the two appeals were taken, and is not separate for any purpose. Although in form separate issue were joined in the appeals, in reality they were but one, and were capable of but one trial."

It would be supererogatory, to point out the distinction between the case of a probate of a will, which *must* always be single and complete in one hearing and where the contest is joint in form and not capable of severance, and the case at bar, where of course it was competent for any of the appellants, against whom relief was sought to set up any defense he might have whether his co-defendants desired to make any defense or not. So far as I remember, there are no other cases one way or the other, decided by this Court which have any special relation to the case under argument.

THE CASE of M. C. & L. M. R. R. vs. Swan, 111 U. S., 379, was very simple. It was there held that a suit by a partnership firm of plaintiffs, one of the

members of which is a citizen of the same State as the defendant, to enforce a cause of action to which the co-partners, plaintiffs, are necessary parties cannot be removed by the defendant. Of course not.

THIS GENERAL CONSTRUCTION of the second section by the Supreme Court, had been anticipated by some of its Justices in decisions on the Circuit. By Mr. Justice MILLER in Arapahoe County vs. Kansas Pacific Railway Company (4 Dillon, 277, 1877). In this case, a citizen of *Colorado*, brought a stockholder's bill in a State Court of *Colorado*, making defendants his own company, viz., the Denver Pacific Railway Company a *Colorado* corporation, and the Kansas Pacific Railway Company (against whom the accounting was had), a corporation of *Kansas*. The Kansas Pacific was held to have the right of removal, which right was not defeated by the fact that a *necessary* party to the suit (the Denver Pacific), was a citizen of the same State with the plaintiff; these two in effect, though not in form, representing one side of the controversy, and the Kansas Pacific Company the other. The distinction is between parties to the suit, and parties to *the* controversy, or *a* controversy arising therein.

In Taylor vs. Rockafeller, 18 Am. Law Reg., 307. Mr. Justice STRONG, expounding the second section, says:

"The right of removal is given where *any one of these controversies* is wholly between citizens of different States, and can be fully determined as between them, though there may be other defendants actually interested in other controversies embraced in the suit. The clause 'controversy which can be fully determined as between them,' read in connection with the other words

'actually interested in such controversy,' implies that there may be other parties to the suit and even necessary parties who are not entitled to remove it. Such other parties must be *indispensable* to a determination of *that* controversy which is wholly between citizens of different States, or their being parties to the action is no obstacle to the removal of the case into the Circuit Court.

Other like decisions by the Circuit Courts:

Peterson vs. Chapman, 13 Blatchf., 395, JOHNSON, Cir. Judge.

Connell vs. R. R. Co., *Ib.*, 241, per BLATCHFORD, Cir. Judge.

Osgood vs. R. R. Co., 6 Bissell, 339, DRUMMOND, Cir. Judge.

Corbin vs. Boies, 18 Fed. Rep., 3, 1883, following Barney vs. Latham.

Ruckman vs. Ruckman, 1 Fed. Rep., 587, NIXON, J.

Langdon vs. Fogg, 18 Fed. Rep., 5, 1883, BROWN, J. (South. Dist. N. Y.).

Northern Pacific Terminal Co. vs. Lowenberg, 18 Fed. Rep., 339, 1883, DEADY, J. (tenancy in common).

Boyd vs. Gill, 19 Fed. Rep., 145, WALLACE, Cir. J.

This case last cited is in point. The learned Circuit Judge says:

"When, however, the separate causes of action could both be pursued against different defendants and settled independently of each other the suit even though it contain a joint cause of action also involves separate controversies and falls within the terms of the act" (19 Fed. Rep., 145). * * * "Clark vs. R. R. Co., 11 Fed. Rep., 355; Kerburg vs. Cotzhausen, 16 Fed. Rep., 705; People vs. Ry. Co., 16 Fed. Rep., 881, are authorities for the broad proposition that whenever the suit is founded on a cause of action upon which at the election of the plaintiff the

defendants might have been sued severally, a non-resident can remove the suit although the other defendants with whom he is sued jointly are residents of the same State as the plaintiff" (19 Fed. Rep., p. 147) * * *

"It is no answer to the suggestion that the suit presents a separate and distinct controversy as between the plaintiff and each defendant to assert that the decree obtained will be a *single decree* as to all the defendants. The same thing may be said of every decree in suits in equity and could have been said in Barney vs. Latham. For these reasons the action were properly removed" (*Ib.*, p. 149).

IN CONCLUSION on this branch,

WE MAINTAIN, under the *first* clause of Section 2 of the Act of 1875:

That the only necessary parties defendant to the foreclosure suit were the appellants who were the principal debtors and the owners of the equity of redemption.

Ebenezer Wiswall was neither; he had no interest in the mortgaged estate (see his answer and the bill), and was at most only a surety for the appellants who were the owners of the property and primarily and ultimately liable for the mortgage debt. Wiswall was, therefore, not a necessary party to the bill; he was at most a proper party at the instance of the mortgage creditors with a view to enable them to have a decree against him for any deficiency that might remain after exhausting the property and *which might not be paid by the appellants as the principal debtors.*

Having answered, admitting the bill, in its full scope, disclaiming title, and insisting that the appellants were the principal debtors, Ebenezer Wiswall is at most, even if he is not a surety, as respects

the complainants a nominal party, without substantial interest in the suit, and with no interest whatever in defenses pleaded by the appellants, and, therefore, his common citizenship with the plaintiffs will not defeat the federal jurisdiction conferred by the citizenship of the appellants, who were the principal debtors, the owners of the mortgaged property, and the only contesting and adversary defendants. By answering as he did, admitting the complaint, he ranged himself on the side of the complainants and against the appellants.

WE MAINTAIN, under the *second* clause:

(*a*) That upon the pleadings the appellants had a *distinct and separate controversy* with the complainants, viz., the amount due on the mortgage in suit, to which controversy Ebenezer Wiswall was not *party at all*, in which he had no concern, and which could be determined without his presence.

(*b*) But if he is to be considered a party to that controversy, he is a mere *nominal party*, having no interest in it whatever.

(*c*) At all events he is not an *indispensable party* to that controversy, and, therefore, his common citizenship with the plaintiffs will not in any view defeat the federal jurisdiction.

WE MAINTAIN, in an action against three debtors, where one, who is a citizen of the same State as the plaintiff, files an answer admitting the debt, and the two others, who are citizens of different States from the plaintiffs, answer denying the cause of action, that the suit is removable by the two contesting defendants.

If so, this suit was removable.

WE MAINTAIN, that in an action against a principal debtor and a surety, where the principal debtor, who is a citizen of a different State from the plaintiffs, answers to the merits, and the surety, a citizen of the same State with the plaintiff, admits the complaint and makes no defense, that such a suit is removable by the principal debtor. If so, this suit was removable at the instance of the appellants.

If the case was one for federal cognizance under any circumstances then the order to remand was made too late.

As soon as the cause was removed to the Federal Court, a stipulation was entered into by which the appellant Ebenezer R. Ayres filed his answer directly in that Court and the parties proceeded to a full hearing on the merits. *The issue presented by this answer could not be remanded, for it had never been in the State court.* The complainants had the interlocutory decree entered on their own motion. They proceeded by summons to bring in the appellants before the Master. They subsequently caused the report of the Master to be confirmed and the decree to be entered.

While it is not claimed that if the case was under no circumstances removable, that this course is a waiver; yet, if under any circumstances it was removable as against the complainants, their course is a waiver of objections to the jurisdiction.

It would be unjust to parties to permit complainants in a case to proceed in this way to decree in one court, subjecting the defense to all the expenses incident to such litigation, and then upon their own motion,

to have the case remanded to another Court, where the whole matter must be again gone over. It seems to me that the rule laid down by WALLACE, J., in Davies vs. Lathrop, 13 Fed. Rep., p. 565, "That if a case has been removed from a State Court on the ground of diverse citizenship of parties, and a party goes to trial and actually tries the case in the Circuit Court, he loses his right to object to the removal on the ground that such diversity of citizenship does not exist," should be applied.

The complainants in this cause knew just as much about the citizenship of Ebenezer Wiswall at the time they filed their bill, and at the time they entered into the stipulation permitting the filing of Ebenezer R. Ayres' answer in the Federal Court, and at the time they proceeded to a hearing upon the merits, as they did when the order remanding the case was made. They concluded to take the chances of a hearing. After the hearing was had and the decision rendered they chose to proceed before the Master to final decree. It would be playing with the rights of parties under such circumstances to permit them, after the final decree in the cause, to have it remanded, if the law does not peremptorily require it.

THE FEDERAL JURISDICTION has been gradually and on the whole wisely, as I think, moulded and fashioned to adapt it to the growth and circumstances of the country. By reason of the essential homogeneity of our people, and the easy and rapid intercommunication between the States, State lines are either never thought of in the intercourse and business of the people, or

thought of only in connection with the protection which the federal jurisdiction gives to transactions and credits. The Act of March 3d, 1875, is the natural outcome of our situation and methods of business. It tends to promote exchanges and strengthen credits. In its entire scope it is in harmony with the spirit, if not indeed, required by the words of the Constitution.

It is fairly open to but one objection, namely, that the pecuniary amount required as an element of jurisdiction may be too small. Our prosperity, as we all know, depends vastly more upon our domestic exchanges and business than upon our foreign commerce. As a result, the Federal Courts naturally find their dockets crowded with causes. It is the duty of Congress to provide the remedy—an increase of the judicial force and, in the respect above indicated, a pecuniary limitation on the jurisdiction as it now exists.

The development of the law, here as elsewhere, perhaps more here than elsewhere, is subject to the influence of currents and counter-currents, the existence or force of which are not always at the time distinctly perceived.

Whoever carefully examines the judgments of the federal tribunals during the last five years cannot fail to observe the marked tendency to narrow the grounds of their jurisdiction. While the manifest purpose of the Act of 1875 was to expand that jurisdiction almost to the constitutional limit, its various provisions have, as it seems to me, been jealously viewed and frequently subjected to a strict construction. Believing that the best interests of the country are bound up with the maintenance of the federal jurisdiction in its full scope, and that its full scope is none too wide, I may

be pardoned these observations upon the tendency and course of the judicial decisions upon it, although those decisions, up to this time, are not in conflict with federal cognizance of my client's case.

To be able to go to the federal tribunals in the enumerated cases is not a privilege, but a right—a right beneficial to the country and valuable to the citizen. And the suitor having the right ought to be received, not with the inhospitality he now meets with in some of the circuits, but with welcome. He ought, of course, to "enter in at the straight gate," but all will agree that the way thereto (whose width is prescribed, in the same language, by the Constitution and the Statute) ought not to be so narrowed by a conscious or unconscious inclination against the federal jurisdiction, that "few there be that find" the way or pass the gate.

JOHN F. DILLON,
JOHN ATKINSON,
For the Appellants.

112-187

Office Supreme Court U.S.
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JAMES H. McKENNEY
CLERK

IN THE
United States Supreme Court,

OCTOBER TERM, 1884.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER S. WISWALL, TUISCO G. WISWALL and ANN E. BRERMAN,
Appellees,

vs.

FREDERICK S. AYRES, JAMES S. AYRES and EBENEZER R. AYRES,
Appellants.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan on an Order Remanding the Case to the State Court.

Brief of Appellees on Advancement and Hearing Under the 32d Rule.

WILLIAM T. MITCHELL,
J. H. McGOWAN,
Attorneys for Appellees.

PORT HURON, MICH.
COMMERCIAL STEAM PRINT.
1884.

In the United States Supreme Court.

October Term, 1884.

CHARLES E. WISWALL AND OTHERS,
Appellees,

vs.

FREDERICK S. AYRES AND OTHERS,
Appellants.

BRIEF OF APPELLEE.

The bill in this case was filed April 15th, 1879, in the Circuit Court for the County of Huron of the State of Michigan, to foreclose a mortgage made by Frederick S. Ayres and Charles G. Learned and their wives, of the State of Michigan, and Ebenezer Wiswall of the State of New York, to Catherine Wiswall of Troy, New York, to secure the payment of $40,105.43 according to the conditions of the joint bond of said Ayres, Learned and Wiswall, both dated January 27, 1869.

The mortgage covers over one hundred different descriptions of land, many of which had been sold before commencement of this suit to a large number of purchasers subsequent to the mortgage, all of whom were made and are necessary parties.

James S. Ayres, one of the appellants and petitioners for removal from the State Court, after the giving of the mortgage, purchased of his father, Frederick S. Ayres, an undivided one-tenth interest in the mortgaged property subject to the mortgage, and became by endorsement a guarantor of the bonds.

In 1871 Ebenezer Wiswall, one of the mortgagors, sold his interest in the mortgaged lands and other property to Frederick S. Ayres, one of the petitioners and mortgagors subject to the mortgage, and took from Ayres his agreement to pay the mortgage but was not in any way released from his personal liability on the bond and mortgage to the mortgagee or his assigns.

In 1874 Charles G. Learned, another of the mortgagors, sold his interest in the mortgaged property to Ebenezer R. Ayers of Sandusky, Ohio, subject to the mortgage, but taking said E. R. Ayres' agreement to pay the amount secured, and said Learned was in no way released from his personal liability.

In 1874 Catherine Wiswall assigned the bond and mortgage to the complainants, her children and heirs at law, and soon after that deceased.

All the complainants were and still are citizens of the State of New York.

Ebenezer Wiswall, one of the mortgagors and defendants, was at the date of the mortgage and has ever since been a citizen of the State of New York the same as the complainants.

The petitioners, defendants Frederick S. Ayers and James S. Ayers were and are citizens of Michigan, and Ebenezer R. Ayres of Ohio.

The citizenship or residence of all or any of the other defendants does not appear by the pleadings or the petition for removal.

James S. and Ebenezer R. Ayers only became necessary parties defendent by reason of their purchases subject to the mortgage and their assumption to their several grantors of their indebtedness.

Frederick S. Ayres, James S. Ayres, Charles G. Learned and Ebenezer Wiswall, severally answered the bill.

Ebenezer R. Ayres suffered the bill to be taken *pro confesso* and was at default when the petition and order for removal were made.

There was an issue formed by replication to the answers of the four (4) answering defendents, and as to all the others, orders *pro confesso* had been entered, and upon these issues and orders, all the proofs were taken in the State Court, and two terms of the court had passed after the issue and orders *pro confesso* before the petition for removal was presented for hearing.

November 28, 1879, James S. Ayres, who was made a party as a subsequent purchaser and guarantor, acting for himself and as agent for Ebenezer R. Ayres, also made a party as a subsequent purchaser and who was then at default, and as agent for Frederick S. Ayres, one of the mortgagors, filed the petition for removal to the Circuit Court of the United States for the Eastern District of Michigan, stating therein that the complainants are and were all citizens of the State of New York, and that he, James S. Ayres and Frederick S. Ayres are and were citizens of

the State of Michigan, and Ebenezer R. Ayres of the State of Ohio.

Nothing is said in the petition for removal of the citizenship of any of the defendants except the three petitioners.

The sole cause for removal from the State Court, and the only reason assigned in the petition (p. 5 of Record) is:

"That in said suit which is for the foreclosure of a mort-
"gage on a large tract of land in the Eastern District of Michi-
"gan, there is a controversy which is wholly between said
"complainants and these petitioners, and which can be fully
"determined as to them without the presence of the other
"defendants."

Upon the filing of this petition and giving the required bond, the State Court ordered the removal of the cause to the United States Circuit Court for the Eastern District of Michigan, in which court it remained and various proceedings had, and it was ready for a final decree and the form of a decree substantially settled when on December 29, 1881, on motion of complainants' solicitor that court made an order setting aside and vacating all former orders and proceedings in the cause, and remanding the case to the State Court for the reason that the United States Court had no jurisdiction, or in other words, that the case was not one subject to such removal, and the improper removal gave the United States Court no jurisdiction over the case, there being no severable controversy in it.

Upon being remanded the State Court resumed jurisdiction, the parties appearing and proceeded to decree in January 1883. These same petitioners making no objection to the resumed

jurisdiction of that court, and after decree in the circuit appealed to the State Supreme Court where the decree was affirmed in October, 1883. After that adverse decree of the State Court, these defendants appeal from the order remanding the case, nearly two years having elapsed, and the case is here on that long delayed appeal.

There is really but one question in the case, that is, is the case one that comes within the statutes of removals? The petition puts the application for removal upon the sole ground that the complainants and the petitioners being citizens of different States, there is in the case "A controversey which is wholly "between said complainants and these petitioners, which can be "fully determined without the presence of the other defend-"ants."

That is, that the case is one in which two distinct controversys exist, and as to which several issues can be framed, and that the other defendants are not necessary parties to the only issue in which the petitioners are solely necessary parties.

We call attention to the record evidence in the affidavit of non-residence and orders of publication, p. p. 28, 29, in the bill of complaint, p. p. 38, 42, 44; 55, 59, and in testimony of Wiswall, p. 132, showing the residence of Ebenezer Wiswall, one of the principal defendants, and one of the original unreleased obligors to have been and to be in Troy, New York, the same State with all the complaints.

Frederick S. Ayres is the only one of the three original mortgagors who joins in the petition for removal, his co-obligors and mortgagors, and who were equally bound with

him, being left out as unecessary parties, while James S. and Ebenezer R. Ayres, subsequent purchasers of undivided shares, join in the petition as if the controversy was wholly with them.

None of the non-joining original parties to the bond and mortgage had been in any way released from liability, and though not joining in the petition they are necessary and not formal parties.

The bill in stating the bond (p. 38) discloses a joint, and not a joint and several obligation or undertaking of the three makers of the bond and mortgage, F. S. Ayres, C. G. Learned and Ebenezer Wiswall.

The leaving out of either of themwould have been a fatal omission. In an action at law the omission of either would have abated the suit, and in equity the bill would be dismissed for want of parties.

Not only all the joint makers, but all the subsequent purchasers and incumbrancers are necessary parties, and there is only one indivisible issue as to all of them.

We insist that under the decisions of this court the petition should have shown the citizenship of all the parties to enable the court to determine as to whom seperate causes of action existed and whether all were citizens of different States.

All persons having an interest in the equity of redemption should be made and are necessary parties and should be joined as defendants.

McGowen *vs.* Yerks, 6 Johns, Chy. R. 450.
Reed *vs.* Marble, 10 Paige, 409.
Fanley *vs.* Bank of U. S., 11 Wheaton, 304.

It is evident that there is but a single and inseperable controversy in this suit, that of the amount of the indebtedness and the mortgage lien therefor, as against all the obligors, and mortgagors, and subsequent purchasers.

In the answer of F. S. and J. S. Ayres, p. 71, fol. 100, they admit an indebtedness and state a tender of the amount admitted.

Ebenezer Wiswall and C. G. Learned also in their answers admit the indebtedness, p. 72, fol. 102, and p. 74, fol. 104, thus clearly showing that there is but one controversy, and that only, as to the amount of the indebtedness.

"The assignee of notes secured by mortgage which was a "junior lien filed a bill to foreclose, making defendants thereto "(1) the mortgagors, (2) the trustees under a deed of trust "which was a prior lien, (3) a guarantor of the notes secured "by such deed of trust, and (4) a tenant in possession under the "mortgagors; held, that such guarantor was not entitled to a "removal of the cause into the Federal Court, because his co-"defendants were necessary parties and the cause could not "be properly determined without them."

"He could only claim a removal when it is unnecessary "for his co-defendants to be present. It is manifest that the "case could not be determined alone as to him. The other "defendants having rights and interests to be protected were "necessary parties."

Darst *vs.* Bates *et al.*, 51 Ill., 439, 448.

It can make no difference that the bill is taken as confessed as to some, substantially admitted by others, and denied by two

(one at default) of the petitioning defendants, all are alike legally and equitably interested and affected by the result

The character of the case as to its divisibility is determined by the issue tendered or case made by the bill and not by the answer or want of answer by any or either of the defendants.

The answering and non-answering defendants are alike necessary to be present, and have liabilities to be enforced and rights to be protected which are inseperable

This proposition is more than sustained by the opinion of Mr. Justice Blatchford, when circuit judge, in Wormser *vs.* Dahlman *et al*, 16 Blatchf, 319, where the petitioner, a non-resident, had alone been served with process, and the court holding in that case that it was one in which there could be no final determination of the controversy, so far as concerned the defendant who was served, without the presence of the other defendants.

In Gardner *vs.* Brown, 21 Wall, 36, this court held that "The bill prayed a foreclosure of the mortgage by a sale of the "land. This required the presence of the party holding the "legal title—the final determination of the controversy there-"fore required his presence."

That ruling would seem to hold that not only was Ebenezer Wiswall necessary to be present, but all the subsequent purchasers who hold the legal title of any of the land

In Barney *vs.* Latham, 103 U. S. Rp., 205, Mr. Justice Harlan in giving the opinion of this court sustaining that removal, holds in substance that there must be a distinct and

separable issue tendered by the pleadings, upon a distinct question to the determination of which the petitioner is alone a necessary party, so that under the Statute of 1866 there might have been a distinct issue or controversy upon another branch or part of the case left for trial in the State Court.

Let it be remembered that Ebenezer Wiswall, one of the unreleased mortgagors, is a resident of the same State with the complainants—that the residence of the defendants other than petitioners is not disclosed by the petition nor by the pleadings except that of Learned and Wiswall; that Frederick S. Ayres, one of the mortgagors, stands alone and is not joined in the petition by his co mortgagors; that the bond is a joint and not several obligation, and that he is joined only by his sons, J. S. and E. R. Ayres, who are only necessary parties as subsequent purchasers, and then the question arises, How can it be said that Learned and Wiswall are not necessary and principal defendants in a foreclosure of the mortgage? or that the case presents a controversy in which F. S. Ayres is alone necessary to be present? or joined with his co petitioners that they only are necessary parties defendant? or that any court in proceedings to foreclose the mortgage or enforce payment of the bond could or would proceed without the presence of all the makers of the bond and mortgage? or all subsequent purchasers holding title?

In what respect is there a severable controversy as to them alone and another case or controversy as to the others, so that their presence is not necessary to its determination?

Without such a separable controversy as to which the petitioners were alone necessary parties, the case was not removable and the United States Circuit Court had no jurisdiction over it, all its orders and decrees in the case were *coram non judice* and the only order it could, or had jurisdiction to make, was the one remanding it to the State Court. Even a final decree would have been void, and if made, was properly vacated and set aside in the order of remand.

The decisions of this court seem to go to the full extent of holding everything done in the Federal Court as without authority and void.

In Blake *vs.* McKim, 103 U. S., 336–9, Mr. Justice Harlin in delivering the opinion of this court says: "We are not disposed to enlarge that jurisdiction (that of the U. S. Circuit Courts) by mere construction. We are of opinion that Congress in determining the jurisdiction of the Circuit Courts over controversies between citizens of different States has not distinctly provided for the removal from a State Court of a suit in which there is a controversy not wholly between citizens of different States and to the full or final determination of which one of the indispensible parties, plaintiff or defendant, on the side seeking the removal is a citizen of the same State with one or more of the plaintiffs or defendants against whom the removal is asked."

In the case of Hyde *vs.* Ruble, 104 U. S., 407, Chief Justice Waite delivering the opinion of the court after holding that the cause was not removable under the first clause of the

act of 1875, says: "Neither do we think it was removable under the second clause on the ground that there was in the suit a separate controversy wholly between citizens of different States. To entitle a party to a removal under this clause there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other." * * * * * "In no just sense can it be said that the pleadings present separate controversies, such as admit of separate and distinct trials. If they do not there cou'd be no removal under the second clause of the Act of March 3, 1875."

In the case of Winchester *vs.* Loud, 108 U. S., 130, this court held that the case presented but a single controversy, although it involved the determination of several questions and affirmed the order of remand.

In Shainwald *et al. vs.* Lewis, 108 U. S., 158, the main dispute was about the partnership. All the other questions, and there were many, were held dependent on that, and that there was no controversy in the case which could be separated from that about the partnership, and fully determined by itself and the order remanding affirmed.

Clearly in this case there is no controversy but as to the amount due on the bond and mortgage, and all the other questions as to the amount or extent of each defendants liability and what lands are to be sold, and to what extent, are dependent on that single controversy.

As to the amount of liability, Ebenezer Wiswall, one of the defendants and a resident of the same State, New York, with the

complainants has a special interest as it is disputed whether the sum of $3,000.00 paid him should be applied on the bond and mortgage or on his individual account, as well as the amount of his advances for which the securities were given, so that it is impossible to determine any controversy in the case without his presence as a party defendant.

These questions are made by the pleadings and proofs and pertain to and are part of the controversy on the bond and mortgage.

Perhaps the question of right of removal by these petitioners is best answered by the question whether a separate decree could be given against them without the presence of Wiswall or Learned, their co-defendants, and co-obligors?

Under the Act of 1866, no one could remove a case unless a separate judgment could be rendered against him without the presence of the other defendants. In an action for joint indebtedness, all the joint defendants must apply for removal both under the Act of 1866 and 1867.

Mervin *vs*. Wexel, 49 How., P. Rep. 115.

We submit that the law of March 3, 1875, has not changed this requirement; that all the joint defendants (except mere nominal parties) must join in the petition for removal, and Learned and Wiswall, two of the principal defendants, as well as all the subsequent purchasers (except J. S. and E. R. Ayres) not having joined in the petition, this case comes clearly within the repeated decisions of this court. The petition was not in compliance with the statute, and the order of removal should

not have been made, and the Federal Court acquired no jurisdiction.

See Bixby *vs* Couse, 8 Blatchf., 73.

Case of Sewing Machine Co., 18 Wall, 583.

Wormser *vs.* Dahlman *et al.*, 16 Blatchf., 319.

We submit that if the case was improperly removed the U. S. Circuit Court acquired no jurisdiction, and even if it had proceeded to a decree, the decree was void and and properly set aside and vacated by the order remanding the case.

This case presents some other features worthy of consideration.

The order of remand from which this appeal was taken was made December 29, 1881 (Record, p. 242), and the application for leave to appeal filed October 17, 1883, and the appeal allowed November 12, 1883 (Record, p. 245), nearly two years (22 months) after the order of remand.

It may be assumed as is shown to be the fact by the affidavit of Wm. T. Mitchell (Record, pages 243–4), that the State Court at once on receiving the order remanding the case, with the files and records, proceeded with the case, both parties taking part and being heard therein without objection to the returned jurisdiction. That it has gone to a final decree, and on appeal that decree affirmed in the State Supreme Court a few days before this appeal and the case is now in this court, not only on this appeal but on writ of error to the State Court upon questions precisely the same as on this appeal, or rather upon the simple question whether a State Court errs in resuming

jurisdiction over a case remanded to it, the party complaining resting on his right to appeal until advised of an adverse decree in the State Supreme Court to which they appealed.

We insist that though these appellants had the technical statutory right of appeal within two years, they by their acts have lost the right, that they should be held to more diligence and not be permitted to wait till the State Court has made a final decree, or in effect to force the other party to suspend all proceedings and wait two years to see whether an appeal will be taken from the remanding order.

The reason should be overwhelming which permits them to sleep on their rights till final action has been or may be assumed to have been taken in the State Court, and then to overthrow judgments or decrees that by their delay they have permitted to be taken. It seems to us be to a clear waiver of the right of appeal.

There is no equity in this appeal. It looks as if it was for delay and vexation merely. We submit it ought to be dismissed even if the grounds are not all we claim for the affirmance of the order remanding the case to the State Court.

In any view, that order should be affirmed.

WILLIAM T. MITCHELL,

Solicitor and of Counsel for Appellees.

J. H. McGOWAN, *of Counsel.*

Supreme Court of the United States.

CHARLES E. WISWALL, WILLIAM McA. WISWALL, EBENEZER WISWALL, TUISCO G. WISWALL and ANN E BAERMAN,

Appellees,

vs.

FREDERICK S. AYRES, JAMES S. AYRES and EBENEZER R. AYRES,

Appellants.

To John Atkinson, Esq., Solicitor for Defendants and Appellants:

SIR—You will please take notice that by an order of the Supreme Court of the United States made and entered on the 8th day of April, 1884, this case was in accordance with Rule 32 of this court, advanced to be heard under the rules applicable to motions to dismiss.

You will further take notice that this cause will be brought on for hearing under said rules on the third Monday of October next, and that annexed is the brief of the appellees which will be submitted to the court in support of the order remanding this case to the State Court, and asking for the affirmance of said order and the dismissal of the appeal therefrom.

Dated September 21, 1884.

Yours, &c.,

WM. T. MITCHELL,

Solicitor for Complainants.